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**IRISH LAND ACTS:
REPORTS OF LEADING CASES.**

IRISH LAND ACTS: ^c
ONE HUNDRED AND NINETY
REPORTS OF LEADING CASES

DECIDED IN
THE HOUSE OF LORDS,
THE SUPREME COURT OF JUDICATURE,
THE COURT FOR LAND CASES RESERVED,
COURTS OF ASSIZE,
THE COURTS OF THE IRISH LAND COMMISSION,
COUNTY COURTS, AND SUB-COMMISSIONS.

BY
EDWARD GREER,
SENIOR ASSISTANT LEGAL COMMISSIONER.

WITH
EXTRACTS FROM THE EVIDENCE GIVEN BY LORD JUSTICE FITZGIBBON,
BEFORE THE SELECT COMMITTEE ON LAND ACTS (1894)

*Elucidating the Principles and Practice of the Court of Appeal in various
classes of Cases decided under the Land Law (Ireland) Acts,
1881, 1885, 1887, 1888, & 1891; with references to
the Provisions of the Land Law (Ireland)
Act, 1896.*

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1897.

Rec. Jan. 16, 1906

P R E F A C E.

IT is now twelve years since a volume of Reports of Decisions under the Irish Land Acts has been published.

During that period five successive Land Acts have been added to the Statute Book.

Since 1881 the Supreme Court of Judicature has given Decisions in some 250 Appeals, involving questions arising upon the provisions of the Land Act of 1881, and the subsequent Statutes.

Many of those decisions, as well as those of the Land Commission, have not been reported, either in the *Irish Law Reports* or the *Irish Law Times*, which are the only mediums for Law Reporting in Ireland.

Under the circumstances, I have ventured, with such materials as I have found available, to compile this volume; and in doing so, I am indebted for much that it contains to the pages of the *Irish Reports*, the *Irish Law Times and Solicitors' Journal*, the reports of Messrs. Donnell & MacDevitt, and the columns of the *Irish Times*, *Freeman's Journal*, and *Belfast Northern Whig*.

It would be impossible in the compass of this volume to give all the Judgments that have been delivered upon this most important and interesting branch of Irish

Jurisprudence. I have, therefore, endeavoured to select those cases which best illustrate the leading principles of the Statutes, especially those most recently dealt with by the Supreme Court of Judicature, as in them will be found the fullest reference to the cases which occupied the earlier attention of the Courts.

In the extracts from the evidence given by Lord Justice FitzGibbon before the Select Committee in 1894, will be found such a clear elucidation of the principles which govern the decisions, that I trust that portion of the volume will be found useful to the Profession and to those whose duties involve an intimate acquaintance with the Land Laws of Ireland.

EDWARD GREER.

DUBLIN, *February*, 1897.

ERRATA.

- Page 102, on last line but one of report, read "is *not* sufficient."
- „ 130, for "19th February, 1896," read "1846."
- „ 189, for "*Resumption* of Rent," read "*Redemption* of Rent."
- „ 239, second line from top, read "*order appealed from affirmed.*"
- „ 413 and 414, in margin, for "1892," read "1882."

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HOUSE OF COMMONS, 1894.

SELECT COMMITTEE ON LAND ACTS
(IRELAND).

THE RIGHT HON. JOHN MORLEY, M.P., *Chairman.*

Extracts from the Minutes of the Evidence given by the
RIGHT HON. LORD JUSTICE FITZGIBBON.

Questions 2,938-9. CHAIRMAN.—You are prepared to give evidence to the Committee, and to assist them in their inquiry, in the terms of their reference as to the principles and practice under the Land Acts, so far as they have come within the cognizance of the Court of Appeal, or are affected by the decisions of that Court?

THE LORD JUSTICE.—What I have tried to do in preparing to give you any evidence that the time has allowed me to gather together, has been to go through my own notes of all the Land Commission cases that we have heard. I index my notes from year to year, and I have taken out a short note of each of the cases that has come before the Court of Appeal since 1882; and, as far as I am myself concerned, I am prepared to give you any information about those cases. I can hardly speak for what is within the knowledge of my colleagues; and I certainly cannot speak for anything that has taken place in any other Court.

Question 2,954.—Now, as to the number of cases on Land Act questions that have come up to your Court on appeal, and the number of decisions, how many are there? I have prepared two tables which will give you an idea of the quantity of business.

The Lord Justice then handed in the tables, which will be found at pages 688-692, Appendix No. 6 to the printed report from the Select Committee on Land Acts (Ireland), 1894; and proceeding, he said:—

I will just make one general observation upon the annual totals, if you will allow me. The judicial statistics are published every year, and are available to everyone. Our officer has given me the returns that he sent in from 1882 to 1893, inclusive. During that time the Court of Appeal heard 211 Land appeals. The numbers rather rose up to 1885, and they then fell, and became very small in 1889; but from 1889 down, in consequence of crops of questions under the Acts of 1887 and 1891, they have risen; and in the last four years they were 12, 13, 29, and in 1893, 39; and from my own notes I know that we have heard 12 this year (1894) already.

Demesne
land.

Question 3,099.—You will observe that what the Act does not apply to is "*tenancies* in any demesne land." That point I do not put as a technical one; but I want to show that tenancies in any demesne land are the subject-matter which is excepted from the Act—to which the Act does not apply. The importance of that is this: that it assumes, to begin with, that you have got demesne land subject to a tenancy; and, to bring the holding within the Act at all, it must be agricultural or pastoral in character; and, furthermore, it must be in the possession of a present tenant; that is, a present tenant holding as an occupier. Now, difficulty No. I.—"Demesne land" is a perfectly understood legal term to all lawyers. It has two meanings, and neither of them will fit in here at all.

Question 3,100.—"Demesne land," in the old feudal sense, I will take first. It includes all lands of the lord of the soil that are not held by freeholders under him, and it will include all lands in the hands of tenants from year to year, as well as land actually occupied by the lord himself. Now, that is the feudal sense. Of course, nobody could put that in here, because, if so, this Act would not apply to any land in the hands of a tenant from year to year.

Demesne
land.

Question 3,101.—The other, the popular dictionary meaning, and a legal meaning, too, is land actually occupied by the lord of the soil in connection with his own residence, and reserved by him for his own use. That will not do either, because the holdings that are to be excluded are tenancies in demesne land; therefore neither of those meanings can be brought in at all. One of them would put all tenant-farmers from year to year out of the Act; the other would leave nothing at all for the exception to apply to. That is the first little legal difficulty with which the question has to be commenced.

Question 3,102.—The first case we had of importance is *Griffin v. Taylor*. In that case there was a handsome demesne of some 680 acres. There was a lot of land—about 20 acres—taken by an agricultural tenant; but every scrap of it was surrounded by plantations and land actually in the landlord's own occupation, and forming part of what was undoubtedly demesne land in every sense, being in his own occupation for his own use. The Sub-Commission held it to be demesne: the Land Commission held it was not. We held that the holding was demesne land within the Act.

Question 3,108.—In this case, just as in all others, a great number of circumstances have to be taken into account—separate rating, demesne wall, position of residence, position of plantations. These will not all concur. The first thing we look to is the instrument

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land.

of letting ; and frequently it describes the land as demesne. Where the land was described as demesne, before it was anybody's interest to describe it untruly, we generally take that description given of it at the time as representing what it was ; but if we find "demesne land" put in afterwards, it does not produce so much effect upon the mind of the Court.

Question 3,121.—There are two more demesne cases which I must mention, if you will permit me. They are both cases of great importance. The first is *Hewson v. Listowel*. It is a case you should know, because it is reported, and it states our principles fully. That is far the largest case we ever had as a farm. This place, Ennismore, near Listowel, was originally a demesne of an old Kerry family. They had a mansion-house and about 120 acres of undoubted demesne land, with an adjoining estate let to tenants. It is the place from which Lord Listowel takes his first title. It is an old family place. In 1812 the house was in the possession of two old ladies, members of the family. Mr. Hewson, a relative of the family, was brought from Limerick, a gentleman, for the purpose of being established on the estate as a farmer, and he got some 1,000 acres of other land ; but he was not given possession of the house, or the 120 acres about it, until the old ladies had done with it. Then a lease was made to him of the whole 1,156 acres, including the house and the demesne, in which the holding was described as "the entire farm and lands of Ennismore." The lease contained a great number of provisions about cultivation, and a covenant to wall-in the entire farm ; but down to a very late date, in correspondence even, and in writing, the tenant had freely spoken of the house and of the demesne as a separate thing. Of course, if it was, it would have been out of the Act. The Land Commission held that it was out of the Act, and that it was still demesne land. It was let for lives, and the last life was that of Mr.

George Hewson, the tenant. He is a very well-known gentleman in Ireland ; a gentleman of high position, and a grand juror. This is his property ; he lives by farming it. The pink paper said there had been a great deal of expenditure on drainage, and so forth ; that the whole of this great tract of land had been farmed by the tenant in the best manner, and there was a very laudatory description of his agriculture. I rather think, as well as I remember, the Sub-Commission fixed the rent ; but whether they did or did not, the Land Commission held that, because there was this house and demesne land, they could not fix a fair rent upon it. We held that, seeing that the mansion-house and the demesne had been thrown into one holding with the 1,000 acres by the lease, under the description of "the entire farm and land," and that the holding was, as a whole, a great farm ; it was agricultural in character, that it was not demesne land ; that the effect of the lease was to identify the character of the house and hundred acres with the rest of it. Now, that is a case on one side. I have one other case in which we reversed the Land Commission, and went fully into all the considerations about the matter. It is the very last case (see Report of *Watson v. Abercorn*), and a very striking one, indeed, on the opposite side ; it was decided on the 26th April of this present year. The holding consisted of about 90 acres in the demesne of Baronscourt, the Duke of Abercorn's demesne, inside the boundary of the demesne of Baronscourt, as it appeared on a map, dated 1867, of "The Demesne of Baronscourt," when it was nobody's interest to give it a wrong description. The holding consisted of two parts, in two different townlands, but adjoining each other. The first of these townlands, Cloonty, had been taken up by the Duke of Abercorn between 1830 and 1840 ; and he had done a thing very well known in the North of Ireland—he had bought out the tenants. What he got he planted ; he

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land.

improved the whole of it ; for ten or eleven years he tilled it himself, and as soon as he had got his plantations all right, and the land improved and drained, he re-let parts of it to tenants, including Watson's predecessor, who got some 90 acres in 1851, it being then surrounded by the demesne. From time to time Watson had had four plots taken away from him, and thrown into the plantations ; but at last came the transaction on which the whole case turned. The Duke of Abercorn, in 1875, wanted 11 acres of this townland of Cloonty to add to his plantations, which he had already extended in every direction. Well, what he did with Watson was this : he offered to give him 19 acres of the adjoining townland of Leglands, in exchange for the 11 acres that he wanted to throw into his plantation ; and there was evidence that when he went to Watson, and said he wanted him to give up the place, Watson said he would not give it up. That was relied on to show that he was not a mere demesne tenant. We did not hold that sufficient in itself. This Leglands portion was bought by the Duke in 1846 ; and at that time there were forty-five tenants on it. It was all tenantable land in 1846. The Duke of Abercorn bought out all those but seven, who remained on until he took up the land from them in 1871, and did exactly the same thing that he had done at Cloonty : he planted it, and walled-in parts of it, and tilled it for a couple of years. And in 1873, after he had only had it for two years, he gave Watson 19 acres of it in exchange for the 11 acres he had taken up in Cloonty. In that state of affairs the originating notice was served, and the holding was described on the pink paper as being one from no point of which could you see anything except the Duke of Abercorn's plantations ; these plantations being admittedly the demesne plantations of Baronscourt. You could not get into the holding without coming through them ; and we held that the Sub-Commission was right, and that the

Land Commission was wrong, and that it was demesne land. I need not say, that there had been no attempt whatever to evict Watson, to put him out, or anything of that sort; he was remaining on there. He served his originating notice to fix a fair rent. He brought the trouble on himself by that; but that is the case.

Question 3,237.—We have had very few home-farms. Until this Act of Parliament was passed I am not sure that I ever heard of one. We had one or two home-farms. I will tell you what the principle was upon which we dealt with them. If we were satisfied in fact that the landlord really wanted the house for his own residence, or for that of his own family, he was entitled to get it under the Act; but if he was only taking it up because he wanted some other tenant, or something of that sort, or it was not for his own *bond fide* residence, he was not. It turned on the facts of each case. I do not know that there is any doubt about the law.

Question 3,077.—*Boyle v. Foster.* (See Report of case.) In that case there was a piece of land and a mill, and there were a number of provisions in the lease about mill-races and mill-powers. It was held under a lease; the rent was £260. The Sub-Commission dismissed the application; the Land Commission reversed the Sub-Commission; and a fair rent of £156 was fixed. There was a covenant in the lease to insure the mill, and there was a provision in the lease that if the mill was burnt, the rent payable under the lease was to be reducible by £80 a year until the mill was restored again. The lease, therefore, showed that £80 a year out of the £260 was mill rent, and £180 was referable to the land.

Question 3,079.—The Sub-Commission in the pink paper put £40 on the mill—of course, mill holdings in Ireland have become in many cases less valuable—and £116 on the land; and that was the way they made up the £156. It was plain under one of the other sections

Mill holdings. that the conditions of the lease, which were just as applicable to a tenancy from year to year as they were to a leasehold, would still apply ; and if the mill was burnt, the £80 would come in, and half of that would fall on the land, and the land rent would thus be reduced to £76, until the mill was built again. We held that it was impossible to apply the provisions of the Land Act to a case where a large, substantial part of the subject-matter of the tenancy and holding was of that character, non-agricultural, involving special consequences, and inconsistent with the fairness of the rent as the result of dealing with it. That was the largest of the mill cases ; but there have been some others.

Question 3,082.—The case *Murdock v. Parkes* is another milling case. It was decided this year, and it was under the Redemption of Rent Act. It was 19 acres 3 roods 22 perches, held under a lease for 999 years. There were covenants to maintain the machinery in the mill. The mill had stopped working. It was a corn mill ; but all the machinery was in it, and the tenant was bound by covenant to keep it there, and he was keeping it, I think—four pairs of stones, or something like that. We held in that case that, having regard to the terms of the lease, and to the apparent value of the water-power, and to the fact that there was this machinery that the tenant was obliged to keep in the place, the entire holding was not agricultural in character. But now what I want to say is this: I do not like to quote my own Judgments ; but in *Boyle v. Foster* I expressly stated that a corn mill can exist on an agricultural holding consistently with the agricultural character attaching to the entire holding, not only mill, but land ; and that might be the case even though the mill was larger than would be required for the particular holding itself.

Question 3,083.—Furthermore, in the case of scutch mills, these mills might be necessarily or properly used for the tenants on the holding ; and the fact that a man

had a scutch mill that was more than he wanted for himself would no more deprive his holding of an agricultural character, as a whole, than a man who had a steam threshing-machine, or any other implement of the kind, could be held not to be a farmer, but a hirer of machinery. Mill holdings.

Question 3,084.—There is a special section in one of the Acts which says that scutch mills are not to be deemed unsuitable ; and I used the scutch mill for the purpose of illustrating the fact that a mill might constitute an indivisible part of the entire holding, and yet not deprive the holding of the character of “agricultural.”

Question 3,077.—The first important non-agricultural case was the case of *Johnston v. Bradley*, where the holding consisted of a piece of land, certainly sufficient in itself to constitute an agricultural holding ; but it also included six houses in Strabane, and we held that the six houses in Strabane, not being agricultural or pastoral, there being no power to divide or apportion, there was an appreciable, substantial, separable part of the holding not within the Act. We had to find one homogeneous character, and we could not find one, all within the Act ; and we were obliged to leave all out. Non-agricultural holdings.

Question 3,088.—In *Crookshank v. Law* (see Report) there was a field of 3 acres adjoining the tenant’s house (he was a well-known solicitor in the North of Ireland), and which, according to my recollection, was actually the property of an agricultural farmer. When I say “property,” whether he held under lease or otherwise, I do not know ; but, at all events, the landlord did not appear, from the evidence before us, to be any large proprietor. Mr. Crookshank took the place (only 3 acres), at £10 a-year, and it appeared in the evidence that his motive in taking it was because it is near the golf ground and other things, and people coming through the field used to distract the

Non-agricultural holdings.

attention of some of the members of his domestic establishment ; and to protect his residence, he took this field at £10 a-year. Of course, he cultivated or grazed it when he got it, and then he tried to fix a fair rent upon the man who had let it to him at £10 a-year. The Recorder of Derry dismissed the application, on the ground that this was not an agricultural holding ; the Land Commission reversed it, and said it was ; and we reversed the Land Commission.

Question 3,093.—In another important case of *Smyth v. Douglas*, there were 12 acres of ground ; but detached from the 12 acres, there was the Petty Sessions Court-house and the rent-office of the landlord, in the town of Dervock, near Portrush. These houses were let ; we held that they were not agricultural, and there not being any homogeneous holding, that we could not bring them within the Act ; although the 12 acres, if held alone, would have been within the Act ; or if there had been power to divide the agricultural part from the other, and for the tenant to give back the non-agricultural part to the landlord, that might have got rid of the difficulty ; but it is not within the Act, and we cannot put it there.

Question 3,095.—Now I come to *Wall v. Eyre* (see Report), the tolls case, in which there were 42 acres and 33 perches, let together, with all the tolls of the fairs and markets of the town of Freshford. The rent was £44 6s. a-year ; the valuation was £35 on the land and buildings, and £4 a-year on the tolls. Of course, everyone knows that the meaning of letting tolls is that they are to be collected by the tenant. There was evidence that for a considerable number of years after the date of the lease (which I have not got), the tenant did collect the tolls, and got, I do not say a large, substantial sum, but got an appreciable sum of money out of them every year.

Question 3,096.—What we had before us was, that they were let ; that they were in the lease ; that they were a distinct subject-matter ; that they were not agricultural ; that they were separately valued ; and whether it is big, or whether it is little, the case does raise the point that if there is one separable, substantial portion of the subject-matter that is not agricultural or pastoral in character, and that cannot have that character attributed to it, we cannot fix the fair rent, just as we cannot fix the fair rent if there is a substantial subletting without consent.

Question 3,239.—The definition of the word “pastoral” in the Act of 1881. It is that it should be “used wholly or mainly for the purpose of pasture, and valued under the Acts relating to the valuation of property at an annual value of not less than £50.” Here you have apparently had a number of cases given to you, and I do not think your attention has been directly drawn to the real difficulty at all. You have to apply these words, “any holding let to be used wholly or mainly for the purpose of pasture.” Of all the words in the Act this (mainly) most graphically illustrates what I have been saying about principle, because it is a relative word ; it is exactly like “reasonable ;” but I may tell you shortly that we have held that “mainly” does not mean merely preponderating ; that if you have a thing in two parts, as it were, and that pasture merely preponderates, that is not “mainly.” Almost every form of metaphor has been used : a main line and its branches ; a predominating purpose ; an overshadowing purpose ; principle and accessory ; dominant and ancillary. You will find all these words used continually ; but unless we can find the principle established, it is not held to be “mainly for the purpose of pasture ;” but if, on the other hand, the tenant really took the place for the purpose of pasture as his main purpose, Parliament has declared that he is not within the Act. The only Judge I know of who has

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tural holdings.

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(definition of
in Act of
1881).

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speculated on the reason for that is Lord FitzGerald, in the case of *Westropp v. Elligott*, where he appears to have thought that the desire of Parliament was to exclude dairy farmers and graziers from the Act ; but, be that as it may, Parliament has not extended the Acts to any holding “let or used wholly or mainly for the purpose of pasture,” with two very extensive limitations. That is to lettings valued at or over £50, and to non-resident holdings ; and no pasture case can arise unless you have either a holding valued over £50, or a tenant who has been laying field to field, so to speak, and who does not live on the grass-land.

Question 3,242.—Sub-sec. 3 limits it to £50 valuation farms, and sub-sec. 4 only extends it to cases where the tenant does not reside “unless” (you will observe also) “such holding adjoins or is ordinarily used with the holding on which such tenant actually resides.”

Question 3,243.—I should wish to refer you to the case of *Westropp v. Elligott*. (See Report.) This is one of the cases that, having been an action in ejectment, got to the House of Lords, and all our decisions subsequently have been more or less affected by it. Before *Westropp v. Elligott* there had been a case stated for the Court of Appeal of *Fiddes v. Montgomery*.

Question 3,244.—It came before the Courts as a question of law ; and I confess the decision seems to have indicated at least an opinion that unless the contract of tenancy had something about “pasture” in it, the holding would not be “let for the purpose of pasture ;” but that was the very point in *Westropp v. Elligott* ; and although *Fiddes v. Montgomery* does not seem to have been much argued, it was wrong, and *Westropp v. Elligott* (which binds us) has laid down the right rule as to the purpose of the letting.

Question 3,249.—In *Westropp v. Elligott* Lord Blackburn laid down this principle (9, Appeal Cases, p. 823):—“In the absence of any express terms, the law

implies, from the mere relation of landlord and tenant that it is the duty of the tenant to do or to leave undone some things ; and a promise is implied from the mere relation of landlord and tenant on which an action lies for a breach of that duty." He had got *O'Brien v. White*, which had been decided on the 6th February, 1884, by Judge O'Hagan, who reversed the Sub-Commission, who held, looking at the place, that it was a pasture holding ; and here is what he says : " A case of *O'Brien v. White*, before the Land Commission, decided on the 6th of February, 1884, was cited, in which the Land Commission, reversing the Judgment of the Sub-Commissioner (Reeves, Q.C.), did say " (here he refers to an argument used on the part of the respondent) " that unless there was an express covenant in the lease, or, what would come to the same thing, a custom such as would cause a covenant to be tacitly in the lease, so that the tenant could be sued on it, if he did not use the land for pasture, it was impossible that the land could be let to be used for the purposes of pasture. As there is no such covenant in the lease, and no evidence of any custom which would cause such a covenant to be tacitly incorporated in the lease, this would, if the argument was well founded, put an end at once to the case." He says that as that case was subject to an appeal, he did not express or form an opinion on the merits of the case ; but he says : " I think it right to say that I do not at present assent to the legal principle stated by O'Hagan, J." I am not reading the whole of it ; but this is a quotation by Lord Blackburn from Judge O'Hagan : " He says the nature and capacity of the soil, and its unsuitability to any other use than pasture, must, it was urged in the case now before us, have been present in the minds of both landlord and tenant at the time of the letting. Very likely it was present to their minds ; but that it was present to their minds in the sense that it formed part and parcel of the bargain, and

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can hold that there is an implied contract." That is a
quotation from Judge O'Hagan ; but Lord Blackburn
proceeds : " And both he and Mr. Litton lay it down,
that the contract being in writing is conclusive as to
whether or not there was a contract on which the tenant
could be sued, with which I do not quarrel ; but they
also lay it down, that though the lands were of such a
nature that they could not in the ordinary course of
things be used except for pasture, they could not be
held to have been let to be used as pasture, unless the
Court could imply a covenant that they should be used
in that way, and no other way. I do not, as at present
advised, agree in this." That is Lord Blackburn's
Judgment. He proceeded to discuss the old Roman
law. He gives an example from old French law :
" A lease of a house in a village is," he says, " to be
taken to be let to be used as a house, and the lessee
cannot set up a forge in it ; but if let to the village
blacksmith, the presumption would be different." Lord
Watson's language is very important : " Whenever the
contract fixes, either expressly or by implication, the
uses which the tenant is to make of his holding, it must,
I apprehend, be conclusive as to the purpose for which
the holding is let to be used." And then he says :
" The difficulties which I have felt in considering this
appeal only relate to the third and fourth of the cases
supposed. In these cases the contract permits the
tenant to make any and every possible use of the
subject let, so long as he observes the stipulations or
local customs applicable to such use, and does not
transgress the rules of good husbandry. If the purpose
referred to in section 58 (3) must be an exclusive pur-
pose, prescribed by the contract between the lessor and
lessee, it follows that in none of these cases could it be
held that the land was let to be used for any particular

purpose. In that view, a tract of hill country, quite unfit in any ordinary sense to be used for other than grazing purposes, would not, although the tenant never did use, and never dreamt of using, it, except for grazing, be a holding let to be used mainly for the purposes of pasture within the meaning of section 58 (3). There would be nothing in the contract to hinder the tenant from reclaiming the land, and converting it, at an enormous cost, into an arable farm or a market garden; although it might be unreasonable or foolish to suppose that any tenant would do so. I cannot think that such was the intention of the Legislature. It appears to me that in those cases where the particular purpose for which the holding is to be used is not defined by contract, the Legislature must have intended that the purpose should be ascertained by reference to the use or uses which the contracting parties must as intelligent and reasonable men be held to have had in their contemplation when they entered into the lease." And there are some very strong passages about meadowing, laying down principles which some one seems to have thought were only recently arising in our cases. The Lords point out that where it would be unhusband-like to meadow, it is a thing that nobody thought of, or ought to be supposed to have had present in his mind as his purpose. That is referred to in a passage in Lord Blackburn's Judgment, at page 829:—"If grass land is mown, and the hay sold away, the grass must be deteriorated;" and Lord FitzGerald speaks of unhusband-like use also. Here it is (page 839):—"If, on the other hand, the contract is wholly silent as to the purpose for which the land is to be used, then it seems to follow that the tenant is at liberty to use the farm in any proper manner, consistent with good husbandry, and so as not to be guilty of waste or deterioration; but, even in such a case, the circumstances may raise a question as to whether the land was so let 'to be used' (and he puts

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emphasis on that) 'for the purpose of pasture.' And that case is the foundation of all the subsequent cases, and notably of *O'Brien v. White*.

Question 3,250.—I would like to give you what the holding was in *O'Brien v. White*, which was a very early case. You observe it had been mentioned in the House of Lords after Mr. Justice O'Hagan had reversed the Sub-Commission. The report in 16 L. R. I. 20, gives the particulars of the holding. It was 194 acres (Irish), all grass; of which 107 were incapable of cultivation, 32 barren rock, 12 capable of being cleared for tillage, 21 had traces of former spade-culture on them (but with those we are familiar all over Ireland: they are the potato ridges that remain from the time when the population was larger than it is now): 22½ acres were capable of being either ploughed or meadowed; but, as a matter of fact, they never had been in anything except grass. I have seen an observation that this case decided, or was supposed to decide, that if a man tilled land with the spade between the crags, we would hold that it was not a pasture-holding. With all respect, that is not so at all. If a man has land that he has been in the habit of using for spade-culture, it is just as much agricultural as any other land; but if the fact is that, being let as grass, nobody ever has dug it, and nobody could dig it, except by either getting himself into the workhouse or spoiling the land, the purpose of using it for pasture is attributed to him; but we are dealing in this and all like cases only with land always used as grass land. *Drought v. Stubber* was a case that was held to be a mixed farm; and there was a very similar case of *Holmes v. Lander*. In one of those cases there was an express power to till 20 acres out of a very considerable farm; but any 20 acres might be tilled each year. We pointed out that the tillage of 20 acres would involve a good deal of capital, and a good deal of labour; and that it might form a very considerable

portion of the purpose of the tenant. We therefore held that these were mixed farms, and that they were not let "mainly for the purposes of pasture."

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Questions 3,252-3.—The case of *Byrne v. Hill* (see Report, *post*) (30 Law Reports, Ireland, page 603) would give a better idea of this point than any other I know of. There the Sub-Commission reported, in answer to the question for what purpose the holding was most suited, that it was suitable for grazing cattle and sheep; and they described it in this way: "This is a good grazing holding, and could be nothing else." They nevertheless held it to be within the Land Act, because meadowing and tillage were not prohibited. It was heard by the Lord Chancellor (Ashbourne), the Master of the Rolls (Porter), and myself. The present tenant had first let the grass to one man, then for two years to another, then to a third; 30 acres had been mown one year, a second mowing was taken off 20 acres in the next year; and that had occurred within five years. "The entire fifty-two years' history of the holding, with this single exception, shows that it was a pasture-farm; and the only time when any hay was taken off the farm was when the tenant was ill, and a neighbouring farmer took it, and gave the tenant a bonus for allowing him to do what was wrong, namely, to remove crops of hay in two successive years. It cannot have been the purpose of the letting that the land should be used in that way." That was the user of the place. Meadowing would have been an unhusbandlike user of the land; it was all in grass, and was described by the Sub-Commissioners as being a grazing holding. We held it to be a pasture holding.

The last case we have had is *McCormick v. Loftus* (see Report, *post*), decided on the 19th December, 1893. It was 413½ acres of land in Westmeath, held under a lease dated in 1871. There were no restrictive clauses

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in the lease. For thirteen years before the letting in 1871 there had been no tillage at all. Between 1844 and 1850 from 14 to 20 acres had been tilled, and at the time the lease was made (in 1871) there were 150 acres of the holding that was what we lawyers call "ancient pasture;" that is, land that cannot be broken up at all without a violation of the law.

"Ancient pasture" in law means land that for twenty years before the letting has been in grass, and the tenant must keep it so, assuming it is not cultivatable grass-land. That case was really decided on the same principle which the Land Commission laid down in *Eivers v. Hamilton* (28 Ir. L. R.), which was a case of land in pasture, and a herd's house, in a grazing district, with a covenant against erecting any building (a thing we always look to), but no express restriction as to tillage or meadowing. The upshot of the whole matter is this: the first thing we look to is the contract. If the contract declares the purpose of the letting, or clearly implies it, there is an end of it, for the parties cannot contradict their declared purpose, whatever it may be; but if the contract does not define the purpose, then we have to get extrinsic evidence, and we take that extrinsic evidence either from negotiations taking place at the time of the lease, or from any other matters that the parties may bring forward. After the extrinsic evidence you go to the subject-matter of the holding, and you look to see what the land is; and, lastly, you look to the user of the land; and in these latter branches we take into account the district where the holding is, the size of it, the nature of the land; and altogether we very much decide the same question as whether, if a man went into a shop, and bought a hat, he did so for the purpose of putting it on his head.

Redemption
 of Rent Act.

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 Relation of
 landlord and
 tenant.

Question 3,451.—What we decided under the Redemption of Rent Act, in *Kelly v. Rattey*, was, that it, as well as all the rest, dealt only with cases where the

relation of landlord and tenant existed. There has been a good deal of confusion about *Kelly v. Rattey*. (See Report, *post*.) We have in Ireland a well-known tenancy called renewable leases ; those people are undoubtedly tenants. There is a statute which enables them to turn their leases into fee-farm grants ; and there is no doubt, as far as I know, that a grantee, holding under one of those fee-farm grants, would be a tenant within the meaning of the Act of 1891, though it is a very technical expression. In *Kelly v. Rattey* what had happened was that a person, who was not a tenant at all before, had got a grant for ever, in 1846, before Deasy's Act of 1860, which made the relation of landlord and tenant depend on contract. We could not hold Kelly to be a tenant if we were not prepared to hold every limited owner who is bound to pay a jointure or a rent-charge to be a tenant also. There was no relation of landlord and tenant ; there was a mere rent issuing out of land for ever ; and we held in *Kelly v. Rattey*, on the same principle as in *Hemphill v. Frazer*, that because the relation of landlord and tenant did not exist, the case was not one within the jurisdiction of the Land Commission. That was the decision, and the only decision there.

Redemption
of Rent Act.

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landlord and
tenant.

As to residential holdings the point is this : The Act seems to assume that each holding has a homogeneous character of some kind, and if a man takes a place, not for the purpose of agriculture or pasture, but for the purpose of a residence for his own enjoyment, and if the soil, as a productive agent, is not the thing that gives a character to what he is taking, but if it is a house he wants for himself, a handsome place, and so forth, then it is not agricultural or pastoral in its character. The first case of *Nunn v. Carr* (see Report, *post*) was a small holding of a few acres, but with a good house upon it ; the next, the case of *Doyme v. Campbell*, refers to a place that I happen to know myself, The Hermitage,

Residential.

Residential. Rathfarnham, near Dublin. There were some 25 acres of land, of which 10 acres were under a villa residence, offices, gardens, and ornamental grounds. The house is a fine one, that used to be let at £180 or £200 a-year for the summer time alone; the remaining 15 acres consisted of two or three pasture fields, and in that case it was held that the character of the holding was residential, and not agricultural or pastoral. That is one class of cases. Then there is a second class, where the holding consists of two parts, and where one part is not agricultural or pastoral, and the other is. There the question is: Can you attribute to the whole thing any one character, and, if you can, is that the agricultural or pastoral character? If you can do that, notwithstanding that part of it, if it were by itself, would not be agricultural or pastoral, the character of the whole keeps it within the Act; but if there is any substantial part of it that is plainly not agricultural and not pastoral, and that cannot be deprived of its character, there it has been held that you cannot attribute to the whole the character that the Act requires. One of the most important cases upon that point was the case of a large mill with special provisions.

Questions 3,051-2.—In the residential holding cases you understand that it is admitted there is only one character in the holding. And the first case I take is a case of 11½ acres and a house at Malahide. I will give you only the leading ones, giving a decided case each way. The Malahide case was that of *Shaw v. Cave*, a house and 11½ acres of land; the rent was £62 15s., and the amount of rent led us to believe that the tenant was paying the rent for his house and not for his land; he had taken a little place to live in, and we had to consider also, of course, the locality. In every one of these cases every circumstance has to be taken into account. Now, here is a case, on the other hand, in which the holding was held to be agricultural—the

case of *Flynn v. Carew*, about the same size, 10 acres and 3 roods; the rent was £24 3s. There was a house on it, and there was a covenant by the tenant to repair the house, and to spend £100 upon it. It was contended that that showed that the house was the main thing; but having regard to the fact of nearly 11 acres, and that the rent was only £24 3s., we concluded that the character was agricultural and pastoral, and that it was within the Act. Now, the next case was the case of *Lepper v. Pooler*, a gentleman engaged in mercantile pursuits in Belfast. He had, I think, some 20 acres of land; I have not a note of the figure: but he went in and out to his business every day from this place. His real business was that of a tea merchant. We held that that was residential, and that it was not agricultural or pastoral in its character, and that it was not within the Act. Then, again, on the other hand, there is a case in which there was almost a difference of opinion, and on which, since, my brother Lord Justice Barry has stated that he thinks he was wrong in agreeing with Lord Ashbourne and me; the case, *Waldron v. de Vesci*. A solicitor took a house a quarter of a mile (I think it was) outside the town of Abbeylaxey, 71 acres of land, rent, £72; the valuation on the buildings was £20, and on the land £48, making a total of £68. The solicitor had his office in the house, and Lord Ashbourne and I both came to the conclusion and held (and Lord Justice Barry did not differ with us then, though he did afterwards say he thought he was wrong) that 71 acres of land taken at the rent of £72 could not be deprived of its agricultural character, as the substantial matter of the contract between landlord and tenant, by the fact that the house was used by the solicitor as his residence and office. I mention these two cases only to show that the question in each case is a question of pure fact, to be determined in every case on a consideration of all the circumstances, acreage, rent, the calling of the tenant, and the way he uses the place—we can reject nothing.

Residential.

Question 3,055.—This word “residential” (a barbarous word, to my mind) is not in the Act. This class of cases is held not to be agricultural or pastoral; and it would occur to me that it is a legal entanglement, and that this exception to the Act rests entirely upon a negative, or rather upon the exclusion of a negative.

Question 3,059.—I must give another case Mr. Russell referred to, because it raised another important point. In *Hunt v. Ryan* the holding was $2\frac{1}{2}$ miles from Clonmel; the rent was £135; the valuation was £68, of which £11 was on buildings, and £57 on land. There were 30 Irish acres and a house, and in some old document (I did not exactly note what it was) it had been called the “demesne lands of Cottage;” but it was demised as 30 acres, with the house or cottage. The Sub-Commission who saw the place dismissed it as “residential;” they held it was of a residential character to look at. They were reversed by the Land Commission. The appeal was heard by the Lord Chancellor, the Chief Justice, Lord Justice Barry, and myself. We were all agreed as to what the question was. The question was whether the most appropriate use of the place as a whole was as a residence, or as an agricultural holding; and of the opinion that it was agricultural were the Lord Chancellor and myself; of the opinion that it was a residence were the Chief Justice and Lord Justice Barry; and, the Court being equally divided, and the parties not applying to have the thing further argued, the tenant, I presume, has got his statutory tenancy.

Question 3,062.—I might mention one other case, because it was very like *Waldron v. de Vesci*—but it fell on the other side of the line—the case of *Stott v. Cramsie* (see Report, *post*), in which a solicitor was advised medically that he should live in the country. He took a place in the country, and went to reside there; and it was held to be residential in its character. Now I come to *Mooney v. Conyngham*

(see Report, *post*), the last case on this point which is Residential. very important. Lord Conyngham was the landlord ; Moonan was the tenant. The holding was 86 acres, 3 roods, and 30 perches ; the rent, £107 ; the valuation, £129—£30 on building ; £99 on land. It joined Lord Conyngham's demesne at Slane ; but it was admitted by counsel that it was not let wholly or mainly for the purpose of pasture, and that it was not demesne land. I say that, because there were a good many elements in the case that might have been considered on these questions, but they were not raised before us at all. It was leased in 1849, by a lease that dated back to 1845, as "that part of the lands of Slane called Castle Park, with the dwelling-house and buildings thereon." There were no covenants for insurance, and there was a covenant not to build any other house upon the place without the landlord's consent. There was a good house and large offices, which would now cost some £2,000. These had been enlarged by the tenant, between 1845 and the time he actually got his lease. The lessee was the agent of the landlord, or, if not his agent, a relative of the agent ; he had put up these buildings apparently (I think there can be no doubt about it) under an agreement. The lease dated back to 1845 ; it was for three lives, and in 1891 only one of those lives was in being, and he was then aged sixty-two. The lessee put the place up for sale ; and the whole difficulty arose from the way he described it. Posters and advertisements in the newspapers, and on the public walls, all described it as a charming residence, with 100 acres of the finest land in Meath attached ; but he added a note : "On the expiration of the lease, the tenant will be entitled to fix a fair rent." Moonan bought it at the auction for £1,600. Of course, if it were a residential holding not within the Act, he got whatever chance there was of the surviving life ; but the advertisement said nothing about how old the

Residential.: life was ; no inquiry appeared to be directed by anybody to that circumstance, and I am not sure, if Moonan had not had another circumstance in the case, that he might not have found it hard to hold his tenancy ; but the landlord's solicitor attended at the sale, and he had a conversation with the auctioneer before the place was put up, telling the auctioneer that it was not Lord Conyngham's view that a fair rent could be fixed ; but he used the expression that he did not wish to "spoil the sale." He said nothing, but he remained in the place, and he proved that he was directed to watch the proceedings, and also that he was prepared to buy the place himself, for £1,200, for the landlord. Well, I confess, speaking for myself—and I only do speak for myself—that I did not see my way to hold that 86 acres of land, at a rent of £107 7s., indicated anything except agricultural or pastoral character. I have always tried to insist that there is nothing in the Act to keep out people who live in good houses ; I have often expressed regret that the houses were not better ; but I think there was a great deal to say in the case to the effect that the house was much too good for the 86 acres. £2,000 it would have cost ; but the upshot of the case was that the Land Commission (and I think the Sub-Commission too) dismissed the case as "residential ;" and we held that we could not dismiss it ; we laying down the principle that the quantity of land, and the rent, and all the rest going together, showed that it was agricultural in its character : but several of the members of the Court insisted also largely on the conduct of the landlord as affecting the result. That is the last of these residential holdings ; and I think I have given you specimens of nearly every class of them.

*Sub-letting.
Consent.*

Act 1881,
Part vii.,
sec. 57.

Question 3,260.—The question of consent is a very thorny one? The difficulty of the question appears by seeing what the state of affairs was at the time that the consent is supposed to have been given, because its

materiality only arose when the Act of 1881 became law, and the dealing on which the question of consent became material was, in most cases, a dealing that had taken place long before, and at a time when consent, or no consent, was quite immaterial to anyone, except someone who had a prophetic idea that this particular form of Act was coming.

Sub-letting.
Consent.

Question 3,261.—Referring to the Act of 1881, Part VII., section 57, the Lord Justice, continuing, said—It is an unnumbered sentence in the middle: “Where the “tenant sub-lets part of his holding, with the consent “of his landlord, he shall be deemed, for the purposes “of this Act, to be still in occupation of the holding.” The plan of it is to impute to the middleman the occupation of the under-tenant; and that is only done where the tenant (mark the words, for everyone of them has been subject to question), “sub-let by the tenant.” “Now, *there* is a very big question. Suppose I, a landlord, make a lease to a middleman, of land described as being in the occupation of under-tenants at the time. I undoubtedly have consented to the under-tenancies; but how am I to work the Act if such under-tenancies are sub-lettings by the tenant? It was imputed to me, that I decided this in a case of *Flannery v. Nolan*, and over and over again “the dictum,” as it is called, in *Flannery v. Nolan* has come up. It never has been decided, because it never has been raised. In *Flannery v. Nolan* it happened that there were some parts of the holding that were in the hands of sub-tenants; but *Flannery v. Nolan* was decided on another ground altogether—on the ground of pasture, I think. In the course of the case counsel was speaking of this, and I remarked: “The assignment of a reversion is not a sub-letting.” I only mention this now to show you that these sub-letting cases are all outside and independent of the case of a letting to a middleman, where the landlord plainly consents, not to the tenant’s sub-letting, but to the land

Sub-letting.
Consent.

being sub-let ; but if you touch that question, or seek to introduce holdings of that kind into the provisions of the Act, the machinery will not work, because occupying tenants alone are primarily within the Act. It is occupation rents alone that the Act enables to be fixed ; and I have pointed out to you that under the Act of 1887 the middleman gets squeezed out, if he has a number of tenants who are entitled to fix rents against him, and the land in his own occupation is not sufficiently valuable to bear it. The leading words in these sub-letting cases are that they deal with a case where the tenant has sub-let, and therefore it must be a sub-letting after he has got his lease. From the earliest times there are complicated statutes in Ireland about sub-letting. Sub-lettings without consent were made absolutely void for one period of the law, and a prohibition to sub-let was inferred in every lease that was silent upon the subject ; but that was only the law for a few years, between 1826 and 1832. Here we have a case of a tenant sub-letting with his landlord's consent : if the lease is silent, the landlord can neither consent nor refuse with any operative result ; but we have held that if he consents, in fact, whether that consent is necessary or unnecessary, it is a sub-letting with the consent of the landlord, and the tenant will not be excluded. On the other hand, if he has simply done nothing, in a case where he had no power to interfere, that it is not consent ; and even in cases where he has power to interfere, his abstaining from interfering by itself would not be enough, although less conduct where he had power to stop it than where he had no power to interfere would amount to evidence of consent. I am giving you the thing generally ; but cases have arisen on those different views. In two remarkable cases—*Bolton v. Keatinge* and *Mulcaire v. Joynt* (see Report, *post*)—we held the tenant to be entitled to fix a fair rent by a more or less refined consideration, namely, a

letting was made by a landlord to a tenant, of a tract that included a little bit that was in the possession of an under-tenant. We found, as a fact, that the possession of the whole was in the hands of the landlord, and we imputed to the transaction this operation, that the landlord let the whole to the lessee, and that the lessee then re-let the little bit to the man who was in possession ; and both in *Bolton v. Keatinge* and in *Mulcaire v. Joynt*, on that ground, it was held to be a sub-letting with the consent of the landlord ; in *Joynt's* case, the sub-tenant had been there for a long time, and we thought there was evidence that the landlord had said to the man, "I will let the farm to you, but you must re-sub-let to the occupier."

Sub-letting.
Consent.

Question 3,266.—As I understand, you have told us that *Bolton v. Keatinge* implies consent from conduct, *Bryan v. Biggs* from prohibition as to part of the holding, and *Mulcaire v. Joynt* from circumstances ?

Answer.—Yes. *Bryan v. Biggs* I did not mention ; but in *Bryan v. Biggs* (to show you what is regarded as evidence of consent) there was a lease which contained an express prohibition to sub-let the two parts of the holding, but said nothing about the third ; and we implied, from the prohibition to sub-let the two parts, that it was intended to consent to sub-let the third ; and the tenant having only sub-let the third, he got his fair rent fixed.

Questions 3,277, 3,288, to 3,294.—On triviality under the Act of 1887. We have had two actual decisions—*White v. White*, and *Ward v. Corballis*. (See Report, *post*.) I have seen something to the effect that we have left the Land Commission without a guide in things of this kind. Each of these cases did lay down a principle of interpretation of importance on the Act of 1887. I will give you the date of each, and will tell you who heard them ; but if you will kindly permit me, I must first refer you to the statute, the 4th section of the

Sub-letting.
Trivial.

Act 1887,
sec. 4.

Sub-letting.
Trivial.

Act 1887.

Act of 1887. There are two paragraphs in the section, and the first is this : " A tenant shall, for the purpose of the Land Law (Ireland) Act, 1881, and of this Act, be deemed to be in *bond fide* occupation of his holding, notwithstanding that he has sub-let part thereof, provided the sub-letting is for the use of a labourer or labourers *bond fide* employed, and required for the cultivation of the holding ; and the Court deemed such sub-letting reasonable, and sanctions the same. The land comprised in each such letting shall not exceed half an acre in extent." There is a principle of interpretation of statutes and of other documents, *expressum facit cessare tacitum*, and there is an express prohibition to apply this labourers' clause to anything more than half an acre.

The second clause is : " A tenant may also be deemed in occupation of his holding, notwithstanding that part is sub-let, where the letting is of a trivial character, and the Court deems the tenant to be substantially in occupation of the holding." You see there are two branches in this clause—the sub-letting it must be trivial, and the Court must deem the tenant to be substantially in occupation of the holding. The first case that arose (12th December, 1893), *White v. White*, was the case of sub-letting to labourers. It was a holding of 173 acres and 3 perches ; the rent was £163 16s. There were two plots sub-let. Of course, there was no consent ; otherwise the case would not have arisen. 1½ acre were in one, 2 acres were in the other ; and they were both sub-let to labourers in this sense, that the tenants were obliged to pay their rents for those holdings in labour, or partly in labour, if required. The landlord's argument was, that because labourers' lettings over half an acre were prohibited, and these were lettings to labourers, therefore the Act showed on the face of it that they were not excepted sub-lettings ; and the Land Commission, following that argument on the principle

See sec. 7,
sub-sec. i. (b),
L. L. (Ir.) Act,
1896.

that I mentioned, *expressum facit cessare tacitum*, held that they were labourers' lettings over half an acre ; and that because they were labourers' lettings over half an acre, they could not be defended under this Act. The principle that we decided was that, as regards labourers' lettings, as well as others, the second clause was to be read, as well as the first. And having regard to the facts that the men were wanted for the occupation and working of the farm, and that the occupation of the middleman was that of a farmer of the whole, and that these sub-lettings to particular tenants were really a mode of securing workmen for the occupation of the entire, he was in substantial occupation of the entire, and the sub-lettings were trivial, and we fixed the rent.

Sub-letting.
Trivial.
—
Act 1887.

In *Corballis v. Ward*, decided this year upon the 24th April, 1894, there was a difference of opinion in the Land Commission upon that case. Mr. Commissioner Fitzgerald thought the sub-letting trivial ; Mr. Justice Bewley and Mr. Wrench thought it was not. There were 161 acres, in three separate parts, and one of the three separate parts was 4 acres and 29 perches, with a house on it ; and that was the part that was sub-let. The rest of the place was farmed by the tenant Ward, but this particular place he had let away ; and, as far as we could see, it had been let away always. We came to the conclusion, that because the substantial holding was really the two large parts, and the occupation by the under-tenant of the third little bit in no way interfered with the occupation of the main holding, that that was to be taken into account in determining the effect of the sub-letting of the 4 acres upon the occupation of the entire, and that it was trivial ; but the principle of the decision was this (and again I will give the *ratio decidendi* which existed in the Court below). Mr. Justice Bewley's opinion was that there were two conditions, the sub-letting trivial, and the Court must deem

Sub-letting.
Trivial.

Act 1887.

the tenant substantially in occupation ; and that both conditions must be satisfied separately and cumulatively ; and that no one could hold in the case of a man who was the statutory tenant of 4 acres and a house, that his holding was to him trivial ; that it could be a trivial thing as between him and anybody else, and that these conditions were cumulative. We said : “ No, they are correlative ; you may find out that the tenant is substantially in occupation, by finding out that the sub-letting is trivial ; and you may find out that the sub-letting is trivial, by finding out that the tenant is substantially in occupation.” And putting the two together as correlatives, we arrived at the conclusion that Ward was substantially in occupation of this holding of 161 acres ; and that the fact of the outlying piece being sub-let did not prevent him from so being in occupation, and was trivial.

Temporary
convenience.

Question 3,254—The Act of Parliament gives no indication of what “temporary convenience” or “temporary necessity” means, and unless I am to be endless, I would only give you some instances on each side of what we hold to be a temporary necessity for the landlord, and what we hold to be a temporary necessity for the tenant. First, take the landlord : there have been a good many cases where the land was let with provisions for taking it up for building. There was one notable case near Dublin, close to Clontarf, where a considerable piece of land was let, with the provision that, I think, nearly half of it might be taken up for building at a specified amount of rent per acre. If the fair rent had been fixed upon the holding, this specific condition would still remain, and at the rate of about £3 per acre the landlord would have had to take up farm land for which he himself was getting only a fixed rent of something considerably less. It was at Phibsborough Avenue, Drumcondra, Dublin ; it fronted to a road, and on the map or the tenant’s lease the actual piece was marked off that the landlord might take up.

There was a very similar case in the North of Ireland, the case of *Whisker v. Delacherois* (see Report, *post*), where provision was made for taking up large parts of the lands to let for villas ; and in these cases we held that the land had been let for a temporary purpose ; that is, that the landlord was letting it only until he could get a building tenant. The first case was one of land close to Rathmines—*Eiffe v. M'Kenna*—where the land had been for a long time in the hands of agricultural tenants, but it was land to which Rathmines was rapidly approaching. I have already given you a case upon the opposite side, the case of *Mooney v. Wilcox* (see Report, *post*), which was decided in favour of the tenant. That was an agricultural farm in an agricultural district, at the same time not quite outside the limits where one might expect buildings to spring up, especially as we have a tram-line there. There was a provision that the landlord might take up about four acres for the purpose of building, but he had never done it. We held that that did not at all show a temporary purpose sufficiently important, nor did it show that the character of the holding was not agricultural ; and in that case (reversing the Land Commission, if I do not mistake) we admitted the tenant, and fixed a rent.

Question 3,255.—These were cases arising from the landlord's necessity ; the other was a case arising from the tenant's convenience ; and another landlord's necessity case was a letting by the Court of Chancery in a minor matter. The Court of Chancery has no power to let land except for what is called "seven years, pending the matter," in a minor's case. If a minor's property goes into Chancery, they make a lease for "seven years, pending the matter." The meaning of that is that the tenant may hold it seven years if the young man does not come of age in the meantime ; if he comes of age in the meantime, he is entitled to the possession. It was held in *Croker v. Clanchy* that that was a temporary letting for the necessity of the landlord.

Temporary
convenience.

Question 3,256.—Of tenant's convenience cases, there are two remarkable ones: the first was *Wilson v. M'Cutcheon*. Mr. Wilson had an old tenant named M'Cutcheon, who was a gentleman of some position. After his death his widow remained in possession. Mr. Wilson took up a good deal of the land for his own son, and it appeared in evidence, as well as I remember, that he wanted the house as well; but the lady was old, and he left her in possession of the house, and some land for her own residence, and there was extrinsic evidence of his not wishing to disturb her. She went to Kingstown; she left the farm; she brought in a nephew. Mr. Wilson then sought to put her out; and we held that he was entitled to do so, and that it had been let for her convenience. I have again to remind you that these are excepted out of holdings that may be held for lives or for years. We held that, therefore, the *tempus* in the "temporary" might be a life. The Chief Baron, I think, differed on that point; but in *Wilson v. M'Cutcheon* it would certainly have been a very unnatural result, if the kindness and the forbearance by which the lady was left in the place could have prevented the landlord from ever getting the place for what he appears to have wanted it for. The last case is a very recent one, *Finnerty v. Cloncurry*. In 1878, at the time this Act was not in force, a middleman's lease fell out, and Lord Cloncurry took up quite a large tract of land. There were on this tract (all the rest of which he took into his own hands) two small holdings held by sub-tenants, who were a pair of old bachelors, and had been a very long time there; and he let them remain on. Of course, it was a new letting, because the middleman had gone out; but he let to these two men for their lives, with a special proviso in the letting, that he only let to them for their personal residence. They served him with an originating notice, and we held (on the 5th of May last) that it was a case

like the other ; on the evidence we were satisfied that it was a personal convenience to them not to disturb them, that no one else was ever intended to take advantage of it, and that, therefore, they were holding for a "temporary convenience" of the tenant. Temporary convenience.

Questions 3,169-75.—To understand the difficulties about town-parks, I have to ask the Committee to go back to the definition in the original Act of 1881, section 58, sub-section 2. It is an artificial definition. I cannot make these cases clear at all until I first make clear what the definition is : "Any holding ordinarily termed 'town-parks,' adjoining or near to any city or town, which bears an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm, and is in the occupation of a person living in such city or town, or the suburbs thereof." That is the original definition ; it is amended afterwards, and the cases on the amending Act of 1887 are quite distinct from those on the original Act of 1881. There must be three conditions concurring to make a statutory town-park :—No. 1 : "A holding ordinarily termed town-parks, adjoining or near to any city or town;" No. 2 : It must bear "an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm;" and No. 3 : It must be "in the occupation of a person living in such city or town, or the suburbs thereof." When you come to the amending Act of 1887, the definition in sec. 9 does not exclude from the Act town-parks in the natural sense, if they are occupied by people who do not live in the town. I hope I make that clear, because a great deal turns upon it. You have not only the character of the holding to look to, but you must also find that it is in the occupation of a townsman ; and, therefore, when you use the word "town-parks" in dealing with these cases, you are constantly liable to the confusion of speaking of a town-park in character, when what the Court means is a Town-parks.

Town-parks. town-park excluded from the Act. They are quite distinct. A town-park to be put out of the Act, and to be within the exception, must be a town-park of which the tenant lives in the town. The second condition has again a curious limitation in its application. The holding is to bear an increased value as accommodation land; that is, not that it is let at a higher rent. For example, in *Killeen v. Lambert*, some of the town-parks that were excluded were held at low rents, but they bore "increased value as accommodation land." The main point is this—and I want to make it clear—that the question of town-park does not depend upon the amount of rent; it depends upon the land bearing a specific additional value of a particular kind. Now, this increased value is increased value as accommodation land. I understand proximity value to be a value that attaches just as much to a farm as to land used for anything else. Proximity value is the additional value that land gets from being near a town, because, in the first place, there is a better market for its produce; and, in the second place, there are greater facilities for its cultivation in the way of getting manure, providing labour, and so forth; but, whether it is a town-park or whether it is not, it seems to me that its ordinary letting value as a farm includes its proximity value; therefore, this section provides that what is to be proved is "increased value as accommodation land." Now, that is not proximity value. The meaning that I understand that to bear is this: that it is value over and above the proximity value arising from the demand for land of that character by a particular class of persons; in other words, it is value arising from demand, if we go back to political economy, if it is not gone to the planets.

The Lord Justice then dealt with the element of residence, and referred to the cases of *Nelson v. Headford*, *Martin v. Annesley*, and *Caruth v. McMahon*; and, proceeding to discuss the question as to what constituted

a "town," he said : " The point of what was a town has Town-parks.
never been seriously controverted in our Court until the Caledon case. There were cases before Judges on circuit, and I believe there have been cases before the Land Commission also, in which the population test appeared to have been used, if not as an exclusive test, at least as a leading test."

Question 3,203.—What we have taken as a test is : Is the place, in popular language, a town ? and being, in popular language, a town, is it proved by the landlord, on whom the onus lies, that the land in question, the particular holding, bears an increased value because there is an accommodation demand by townsmen for it ?

Question 3,205.—We never decided that any assemblage of houses and people would constitute a town, but any assemblage of houses and people *larger than a village*. That is a quotation from Johnson's Dictionary. Where there was such "a demand for accommodation land" that there was a rise of value because there were people living in the place who wanted accommodation land, we held that to be evidence that the place was so considerable as to be a town ; in other words, the two things are correlative. If there is an assemblage of houses, to begin with, larger than a village ; if we find that the inhabitants of that assemblage of houses have raised the value of the particular holding by demanding additional accommodation land ; then, and then only, is it a town-park. But the population test alone is most fallacious. The Lord Justice then referred to the cases of *Goodbody v. Perry* and *Archer v. Caledon* (the reports of which will be found in this volume) ; and, continuing, he said—

Question 3,221.—The Court of Appeal has never hesitated to lay down to the best of their ability every principle of law involved in any case that has come before them. We have had a great many of them,

- Town-parks. and I am unaware of any case in which the principle has not been decided where it arose ; but there is a principle and a principle of law that we have laid down again and again, and that is, that where the decision of any particular case rests on the facts of that case, you must not lay down a general principle by which one man's facts will govern another man's rights ; and again and again we have been obliged to emphasize that, in consequence of the tendency continually existing to get a ready-made, easy arithmetic by which people's rights are to be decided in different cases on general principles, where those general principles are not principles of law, but are principles of fact. Now, I ask you to allow me to give you two instances. Very early
- Each case must be governed by its own facts. in our business we had some town-park cases in which Mr. Givan was landlord. I think there were five tenants, and all five cases were dismissed. The town was Aughnacloy, one coming rather near the line of whether it is a town or not. We went into each case, and we thought the increased accommodation value was proved in three of the cases, and was not proved in two ; in the three where it was proved we held that they were excepted town-parks ; in the two where it was not proved, we held that they were not. That is an early instance. I will also give you the latest. We had a case the other day in which a number of cases were all decided together against the tenant. *Stewart v. Davidson* is the name of the case : I have not got the town ; but there one tenant had picked up (not an unusual thing with townspeople in Ireland) a number of little holdings round about the town ; and he served originating notices to fix a fair rent upon them. The tenant was an undoubted townsman, and several of the holdings were undoubted town-parks within the exception in the Act of 1881. The question arose on the words "ordinary agricultural farm," in the Act of 1887 ; but I am now illustrating this matter of principle. We
- Town-parks.

found in two of the cases that the land was stocked, Town-parks. meadowed, or cropped, and we held that these had been let and used as ordinary agricultural farms, although only fields; there was a mill, I think, on one of the other holdings; there was a quarry on another; and there was a brick-field on a third; but we insisted on counsel going through them one by one, with the result that we picked out those where the land was let and used as an ordinary agricultural farm, and we affirmed the decision in those where it was not so. I give you those two cases on the matter about which you have asked me, not so much because of their importance, but because they show you the impossibility of deciding one case by another on a question of fact.

Question 3,223.—I have been specially asked to mention to the committee (by one of my colleagues, who has insisted on this very frequently) an illustration from the cases where reasonable skill is the question. An action is brought against a surgeon for want of reasonable skill; or a railway company are sought to be made answerable for want of reasonable care. In every case of that kind, every circumstance in the case must be taken into account; and Lord Halsbury (I think it is) has laid down that it is an unprofitable inquiry to discuss the facts of one case in another case where the facts are different, and the decision depends on a question of fact. To that extent (and I emphatically state to that extent only) the Court of Appeal has refused to lay down principles in these land cases. You asked me the question, but it applies more directly, and arises more strongly, on the pasture cases than it does on any other, for a reason which I will mention when we come to that part of the Act. On the question of town-parks, I have, up to the present, been entirely on the Act of 1881; there is still the Act of 1887, section 9. That is the distinction between a holding "let and used" as an ordinary agricultural farm at ordinary value, and so on.

Town-parks.
Act 1887.

Question 3,229.—The Act of 1887. We have had several cases on this, and you will see at once, when you read the Act, how it arises. To show you the labyrinth we get into, take this :—the tenant has first to show a holding agricultural or pastoral in its character ; the landlord has then to show a town-park, with accommodation value in the possession of a man living in the town. Then the tenant may come again, and proceed to show an exception on that exception, because this 9th section is an exception out of the exception that is in the 1881 Act. It is not an unworkable system of legislation ; but it is complicated. Section 9 says :—“ A holding shall not be deemed to constitute a town-park, though within the definition of the expression ‘ town-park ’ in section 58 of the Land Law (Ireland) Act, 1881, if it is let and used as an ordinary agricultural farm.” That is to say, the definition being what I have already told you, a piece of land having additional value as accommodation land, in the hands of a tenant living in the town, shall nevertheless have a fair rent fixed upon it, if it has been let and used as an ordinary agricultural farm. There is a contrast between the words “ ordinary agricultural farm ” with “ ordinary farm ” or “ ordinary land ” mentioned in the previous Act ; and, therefore, emphasis is apparently pointed to the word “ agricultural.”

The Lord Justice mentioned the reported cases of *McNamara v. McNamara*, *Davidson v. Stewart*, *Murphy v. Harrington*, and *Daly v. Wright* (see Report, *post*), and proceeded to state :—The question in these cases always is (you will understand it is still a question of pure fact) :—Is the thing which is already within the Act of 1881 taken out of the Act of 1881 by having been both let and used as an ordinary agricultural farm. And there is a very justly narrowing provision, that it must be both let and used ; that is, that the landlord’s intention, as it were, comes into the question

of letting it out, once it is proved to be a town-park. Now, the last clause also is important, as an indication of the meaning of this exception: "without substantially interfering with the improvement or development of the city or town to which it belongs, or the accommodation of the inhabitants thereof."

Town-parks.

Act 1887.

I have already pointed out to you that, in consequence of the curious mixture of condition of tenant's residence, and character of the land, the development of the town may be just as much cut up under the Act as it stands, as if it was not considered at all; because if the tenant lives outside, his town-park may interfere as much as ever it likes with the development of the town, yet he must have his rent fixed. And there is not to be found in the legislation, what one might have expected, some provision that land of a defined character, namely, land that is likely to be wanted for the accommodation of the inhabitants—and which, if it were fixed with a statutory tenancy, would interfere with the development of the town—so to speak, put it in a strait-waistcoat—that that land shall be taken out of the Act; nor, on the other hand, is there any definition that the excluded tenants are to be townspeople. Many farmers live in towns, and yet, if they live in the town, they will be thrown out of the Act, unless they can show that the piece of land that is within the zone has been let and used as an ordinary agricultural farm.

See sec. 6,
Land Law
(Ireland) Act,
1896.

Question 3,477.—On the point of present and future tenant you have explained that very clearly to us; in fact, it is an arrangement made by the Statute; but have any cases arisen where the line was very close? It was run so close as this—why Parliament did it, I am not to speculate—but a man who made his contract of tenancy on the 30th December, 1882, was in a different position from a man who made his contract of tenancy on the 1st or 2nd of January, 1883. The man who bargained in 1883 was supposed to be bound

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future tenants.

Present and future tenants. by his bargain as a future tenant; the man who bargained in 1882 was not bound by his bargain, but was a present tenant; and it ran very close in *Briscoe v. Howell*, where the lease was made on the 8th December, 1882: possession was given under it on the 18th December; but the lease ran for a term of years, from the 1st of January, 1883, and the rent did not begin until the 1st of January, 1883. The Land Commission held that it was a future tenancy, beginning on the 1st of January. We held, "No, the tenant was occupying before the 1st of January, under a contract of tenancy made before that day, and he was entitled to his fair rent." You may think these questions metaphysical; it is the facts that raise them, and they have to be decided.

Question 3,480.—The case of *Conroy v. Drogheda* (see Report, *post*) was this:—Mrs. Conroy was the widow of a tenant who had two holdings: one of them she got on his death—a place called Teneille; the other holding, Mullaghanard, was taken by the deceased's brother; I presume he had died without children, and that they had divided the two farms in that way. The wife would be entitled, under the circumstances, to half, and the brother to half; but probably they did not want to have anything to do with administration; the brother was evicted for non-payment of rent; the widow wanted to take part of the evicted farm, and the landlord was willing to give it to her; they entered into an agreement by which the rent of Teneille and the other were fixed as a joint rent, and they put into the agreement that she was to have the two denominations as one holding, at a bulk rent. She was to get the old holding in Teneille, and 10 acres of the Mullaghanard, at one rent and as one holding. That occurred in 1885; she remained on for some time, and then served an originating notice to fix a fair rent on the whole of both; the landlord said, "No, you are

a future tenant, because you only hold this land since 1885 ;” and then the Land Commission allowed her to amend her notice by excluding the 10 acres altogether ; she was a hopeless future tenant as regards that : she had never been in at all until 1855, since her husband’s time. They allowed her to amend the notice, and to treat herself as present tenant of her old holding in Teneille ; the rent was fixed upon that, and the order of the Land Commission said nothing about the 10 acres ; it left it really to be squabbled about, and the landlord appealed. We held that, in order to surrender property, and, above all, to surrender a present tenancy, at common law, a man must understand what he is doing, and must intend it, or it shall not be taken from him ; that is the good old equity doctrine applying to release and surrender, and, in fact, to parting with possession of any property. The agreement had been drawn up in the landlord’s office ; it contained expressions about “ old holding,” and paying taxes “ as heretofore.” We were satisfied that the old lady never intended to alter her *status* as regards Teneille, and we were also satisfied that she thought she had the rights of a present tenant in both Teneille and Mullaghanard ; but we could not possibly give them to her in Mullaghanard, and, therefore, we gave her the next best thing we could ; we held that she had never surrendered Teneille, and therefore might fix a fair rent upon it. That was the Judgment, and the whole Judgment, of the Court of Appeal ; but the case became complicated, and it perhaps misled people by this. Mr. Justice Bewley had taken up the 20th section of the Act of 1881, that says that, “ whenever the landlord resumes possession, a tenancy to which the Act applies shall be deemed to have determined ;” and he turned that into a negative—that no present tenancy shall be determined unless and until possession is given up. There have been three previous cases tending in that direction ;

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future tenants.

Present and future tenants. *Jackson v. Hagan* was one of them ; but that case came to the Court of Appeal. On the 8th December, 1891, on a case stated, Mr. Justice Bewley put the question, whether a consolidation of holdings and an alteration of rent, after 1882, necessarily made it a future tenancy. Our answer was this : that the facts were insufficiently stated, and, in some respects, contradictory ; that it was a question of fact whether there was a new tenancy or not ; and that the acquisition of an additional piece of land, and the fixing of a bulk rent for the entire, did not *necessarily* destroy the previous present tenancy ; and with that declaration we sent it back ; but whether he ultimately held that, as a matter of fact, there was the present tenancy or not, in the particular case, I cannot tell. We laid down :—"It is a question of fact, and the alteration does not necessarily do it." (See report of *Jackson v. Hagan*.)

Adams v. Dunseath. Tenants' Improvements. *Question 3,315.*—*Adams v. Dunseath* is in the 10th "Law Reports" (Ireland). It occupies ninety pages. The holding was part of the lands of Kildowney, near Ballymena, 42½ acres ; and the rent was £36 10s. when the originating notice was served on the 17th October, 1881. Before 1842 33½ acres were held by a tenant named James M'Kee, under Lord Mountcashel, at a rent which did not appear. In 1842 the lands were valued, and a rent of £26 11s. 6d. was put on the 33½ acres ; and between 1842 and 1845 James M'Kee built a house, using in some degree the materials of an older house. He built that house, as the case found, under an understanding, though not perhaps a contract, that he could have a lease if he wished.

Question 3,318.—Between 1842 and 1845 he built this house ; and on the 2nd of March, 1846, he got a lease for thirty years from 1st of November, 1845, at £26 11s. 6d., the valued rent ; that thirty years' lease expired on the 1st November. 1875. Being in possession under that lease (a very important fact), in October,

1846, he assigned all his interest to John Adams, who was the father of David Adams, the tenant before the Court, for £240.

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Question 3,319.—As the law then stood, that assignment conveyed the house to John Adams for thirty years, but for no longer. John Adams lived until 1869, and died leaving David Adams in possession. David Adams was the tenant before the Court; and (a very usual thing in Ireland) he apparently had not taken out administration, and had no legal title; but we do not question those things in Ireland; it is for the revenue to look after that. David Adams was admitted to represent John. Now, the next step, and, in my judgment, a vital step, was in 1851; it is in print, at page 112 of the Judgment, that it was "1857:" it was 1851. On 13th April, 1851, the Landed Estates Court conveyed the Mountcashel estate in Kildowney to William Dunseath, the husband of Mrs. Dunseath, who was the landlord before the Court in 1881, for £6,000; that is to say, in 1851 Dunseath bought, with other lands, this holding of Adams, subject to the lease for thirty years; but again, as the law then stood, that £6,000 bought and paid for the house from the time the lease was up. Of course, the tenant had it so long as the lease lasted. That house was the only alleged improvement made before the lease; but during the lease John Adams put up some buildings; he reclaimed land; he made fences, drains, and a farm-road. He died in 1869. After his death, and before 1875 (that is during the last six years of the lease), David Adams did some other improvements, reclamation, fences, and drains: and during the lease he also picked up, from time to time, bits of bog, amounting altogether to 9 acres, or thereabouts; and he paid rents for them, amounting to £4 10s. (these were small rents all added together); and he improved a part of the bog by reclamation. The bog was not in the lease; but that

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brought his acreage to $42\frac{1}{2}$ acres, and his whole rent, as you will see, up to £31 1s. 6d. The lease expired on the 1st November, 1875, and there is a very important statement on page 113 of the Judgment. When the lease expired, as was common in Ulster (this was near Ballymena), there was a re-valuation for the purpose of fixing the rent. They had a kind of fair rent arrangement of their own in that part of the world, and this holding was re-valued ; and strangely it happened that it was re-valued by the same man who had fixed the rent in 1842—thirty-three years previously. “ He stated that in valuing the land he took no improvements into consideration, but kept the improvements out ; ” and he put £31 17s. 6d., or what had been in the lease, and £4 10s. was added for the bog, which made £36 7s. 6d. ; and at that rent, as tenant from year to year, Adams held at the time he served the originating notice in 1881.

Question 3,324.—The case came before us on a case stated setting out all these facts. A copy of the case is given in the Report. Adams had served an originating notice, that was heard by a Sub-Commission (Greer, A.L.C.), and they fixed a rent of £30 15s. ; but I apprehend that £30 15s. included the bog, as well as the other land ; that is to say, they reduced the £36 7s. 6d. to £30 15s. That came before the Sub-Commission on the 19th November, 1881.

Questions 3,327-8-9.—Dunseath appealed ; and on the 9th January, 1882, the Land Commission affirmed the order of the Sub-Commission, and affirmed the rent £30 15s. The landlord again appealed, and then the Land Commission stated the case.

Question 3,332.—They submitted five questions that were not the same as the five questions we answered ; and to understand the position of the Court of Appeal in the matter, I must ask leave to point out what the distinction was. Their first question (I will put them

shortly) was whether the landlord should be allowed rent in respect of all improvements before the lease of 2nd March, 1846.

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Question 3,334.—That would cover the house and all that was done under the lease. The second question was, whether the landlord was to be allowed rent in respect of all improvements made during the lease, except those made by David Adams. That was a small point; but the point was whether John Adams was the predecessor in title of David, because (as I told you) David had not taken out administration or anything of the kind. Then the third question was, whether the landlord should be allowed rent—any rent in respect of all improvements made before the making of the lease of the 2nd March, 1846.

Question 3,335.—That was the house only; the case so found (page 111). Fourth, whether the landlord should be allowed any rent in respect of improvements made during the currency of the lease, on the ground that the final clause of the Act of 1870 (sec. 4) required some deductions to be made, in ascertaining the tenant's interest in such improvements, for enjoyment and for the other matters mentioned in that section. And fifthly, and lastly, whether the landlord should be allowed some rent in respect of improvements made during the lease, on the ground that the tenant by holding under the lease had been, if not altogether, to some extent, compensated for his improvements, by having been allowed to enjoy under the lease.

Question 3,336.—Now, these five questions submitted to them by the Land Commission, the Court of Appeal refused to answer, on the grounds—I will give them from the Judgment of the Lord Chancellor, on page 117—these questions were based on requisitions from the landlord's counsel, which are given on page 116; and here is what Lord Chancellor Law says, on page 117: "However well adapted the requisitions were for

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their original purpose, they are exceedingly difficult, if not practically impossible, to answer clearly when thus turned into questions. Some of them propose a single legal question, as applied to different states of facts : and, in short, any precise answer to them would require so many qualifications and distinctions, that we have thought it better, on the whole, to extract for ourselves and answer the purely legal questions which arise in the case as stated, leaving the Land Commission to apply our answers to the facts as they have already been or may hereafter be found by them." Put shortly, the question whether the landlord was to be allowed any rent, and, if so, how much, in respect of any particular improvement, depended partly upon the facts of the case with regard to that improvement, to which the Land Act says the Land Commission alone are to address themselves ; and no decision as to the amount of rent or value can be reserved for the Court of Appeal, and a case can be stated only on a question of law—that is the 48th section of the Act of 1881.

Questions 3,344-7.—It will perhaps make what you are going to tell us clearer if, before giving us the five legal questions which you extracted from these points submitted to you by the landlord, you gave us broadly the two extreme contentions of the parties. The landlord contended that, having regard to the dealings, the tenant's starting-point was the re-valuation of 1875, when Adams became a tenant from year to year, at the rent fixed then of £36 7s. 6d. ; and he contended he was entitled to the fair rent of the holding in full, as the holding stood when the letting was made. It was in law a new letting, the lease having expired. The lease was out on the 1st November, 1875 ; the tenant was put in at a different rent on the re-valuation ; and the landlord contended broadly this—and, of course, I am putting his extreme contention, because he fought each part separately afterwards—his furthest contention was

that the fair rent should have been fixed on the holding, as he let it immediately after the 1st November, 1875, improvements and all. There were two most important contentions by the tenant, and I do not know that you have had them very clearly yet. The first great contention of the tenant was that whenever the letting value of land has been increased at all by any work done by the tenant, the whole increase of the letting value belongs to the tenant, and is not to be taken into account at all in fixing rent. His second contention was, if he could not go that far, that the Act of 1881 (section 8, subsection 9) was to be read wholly irrespective of any other clause in the Act, and that whatever improvements the tenant had made upon the place were to be wholly excluded from consideration in fixing a fair rent, no matter what had been the history of the holding previously. Do I make that clear? The things are quite distinct. The first point about increased letting value is quite distinct from the point of the correlation of the Acts to each other—the Act of 1881 with the Act of 1870.

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Questions 3,349-51.—The first contention, I think, you made very clear; I am not so certain that I follow the second as clearly? The second you will probably follow better from the Judgments; but upon the first contention the Court was unanimous against the tenant—that is, that “improvements” was defined (1870, section 70) to mean the works done by the tenant, and that what he was exonerated from rent upon was, not the total increase of letting value caused by those improvements, but the improvements themselves, the works done by him, and his expenditure upon them. I have given the extreme contention of the landlord and the extreme contention of the tenant. The tenant also contended, as regards each class of improvements, those before the lease, during the lease, and subsequent to the lease, that the works ought to be entirely left out; but his

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extreme contention was what I have told you, that the improvements which were exempted from rent included the entire increase of letting value consequent on the making of each and all of those improvements ; and, secondly, that 1881, section 8, sub-section (9), even taking "improvements" in its narrower sense, exonerated every work that he did from being assessed for rent at all.

Questions 3,352-53.—That is to say, that, practically, section 4 of the Act of 1870 did not apply to them at all ? The last clause of section 4 of the Act of 1870 was one of the main clauses ; but there are other clauses about compensation and other things to which the same arguments applied. It was, in point of fact, whether the parts of the Act of 1870 which dealt with the subject of compensation for improvements, affected so or measured what was the interest of the tenant to which regard was to be had in fixing the fair rent under the Act of 1881, section 8 (1). I think perhaps it would be better for me to get rid, once and for all, of that question about the full value. Lord Chancellor Law, on page 118, puts the case very clearly. Now, mind, I am not on any point except the tenant's claim to the total increased letting value. It is a perfectly separate question, and it is one on which the Court was entirely unanimous. He says: "In the Act of 1881" (page 119), "therefore, as well as in the Act of 1870, we must interpret the word 'improvements' as meaning simply suitable and ameliorative works executed or done upon the holding. Being suitable and ameliorative, they, of course, increase its letting value ; but the works are one thing, and the increased letting value another. The works executed by the tenant are wholly his, and are to be completely protected and secured against confiscation, whether by imposition of rent on them or otherwise. But so far as those works may have brought out latent powers and capacities of the land, and so increased its letting value,

that increased value does not necessarily belong to the tenant; because, whilst there are many cases in which the increased yearly value would be no more than a fair return for the tenant's outlay in effecting the improvement, as in the case of permanent buildings, and in many kinds of reclamation, there may still be cases (as mentioned by Mr. Butt in his treatise on the Act of 1870, at page 128), in which the increase of yearly value is so greatly in excess of the most liberal allowance to the tenant in respect of his improvement works, that the landlord in the ascertainment of a fair rent is justly entitled to have some share of that increased yearly value.

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"In my opinion, therefore, the negative provision contained in sub-section 9 of the Fair Rent Clause (section 8) of the Act of 1881, that 'no rent shall be allowed or made payable in respect of a tenant's improvements,' secures against the imposition of any rent only the improvement works, that is, their yearly value, leaving any increased yearly value beyond that to be dealt with under the earlier part of section 8, as may, under all the circumstances of the case, be considered just and fair between the parties."

The Lord Justice, I may say, having read that, that is only the continuance of the same; and there was no difference in the Court upon that point. Bear in mind, once for all, you will not find in *Adams v. Dunseath*, from the beginning to the end, any presuming, on the part of the Court of Appeal, to enter on the question of the *amount* of rent that was to be allowed. The elements that were to be considered were matters of law, and those we tried to lay down; but what the effect of the consideration was to be, in amount, was removed from our jurisdiction, and we did not meddle with it.

Questions 3,356-7.—So far as this point is concerned, can we ascertain from you whether there was anything in the Judgment in *Adams v. Dunseath* directing what

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was to be done with that part of the letting value arising from the improvements, after the cost of them had been given to the tenant? There is a passage in the Judgment of Sir Edward Sullivan that does go very much to that point. I intended to quote it later, on another question. What we all meant, at all events, and I think we said it—I hardly like venturing to give the substance—was that they were to go back to the Land Commission; and that, having regard to the interest of landlord and tenant as defined by the law, they were to do what was fair and right in fixing the rent. That question of how it was to be assessed, whether by first taking the cost, and allowing a certain interest upon it to the tenant, and the rest to the landlord; or by taking a proportionate value of tenant's interest and landlord's interest, and then dividing it—that was a question of valuation, and was taken from us; and as to the mode of working it out I can say nothing: I know nothing. We had to give them the legal elements on which the valuers were to proceed; but the mode in which the valuers were to proceed was left, as you will see in many passages stated expressly, to the Commissioners, who were supposed to have professional understanding and knowledge as to rent and value.

Question 3,358.—The Lord Justice then continued to read from Lord Chancellor Law's Judgment:—"For it should be observed that though the absolute prohibition of charging rent, contained in this 9th sub-section, is thus limited, it by no means follows that rent is to be charged on all outside the scope of the prohibition. That is a matter for the Commissioners in the exercise of their discretion, and having regard to what may appear to them to be just and right." Of course, "just and right" means just and right having regard to the particular facts of the case. That all bears on what I was on. I wanted to give you one passage from Sir Edward Sullivan's Judgment, to show the same

thing. It begins on page 136 :—" My opinion is that the word 'improvements,' as used in the 9th sub-clause of the 8th section of the Act of 1881, must receive the same, or rather the identical, meaning it has in the Act of 1870 ; and in the various other parts of that Act, and the Act of 1881, where the word occurs, it does not, and cannot, mean the increased letting value of the holding caused by the making of the improvements, but simply the works which have caused that increase, or rather, the interest of the tenant who made them, *measured by the money expended on them, as declared and limited by the said two Acts.* An interpretation of the 9th sub-section in question, which would make the term 'improvements' therein mean the whole increase of letting value, involves consequences so large and startling that one testing the construction of the statutes is at once disposed to think some error must exist ; for as a tenant, on quitting his holding, would only be entitled at the utmost to the value of the expenditure on the work that caused the increase of letting value, he, remaining in his holding, and claiming to have a fair rent determined, would, on such an interpretation, be entitled to have awarded to him as his own property, as against the landlord, the whole increase of letting value caused by his expenditure." He then sets out instances. He gave an illustration of a man spending £500, causing an increased letting value of £100 a-year, and in which the compensation would be £400 ; and on page 139 he says this :—" In the illustration I have put, the duty of the Commissioners in determining a fair rent would not be to allow the tenant the whole increased letting value of £100 a-year, but to assess what would be a fair percentage or-yearly allowance for his expenditure, checked and qualified by the consideration of what he would get on leaving his holding ; and supposing they thought £400 would be the sum payable, and that a percentage of £10 or £12

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per annum was to be allowed upon it, they should leave the £40 or £48 for the tenant free from any rent in respect thereof, while the remaining £60 or £52 should be dealt with by the Commissioners under the early part of the 8th section of the Act of 1881, with due regard to the interest of the landlord and tenant respectively." But then he adds what I must call attention to:—"These figures are only used by me to illustrate my meaning. All this would be for the Commissioners, acting under the principles I have indicated, and by which, I think, they are bound." I may say each Judgment has a passage in it on this point. The Chief Baron, at page 157, said he thought it was not intended by Act of 1881, section 8, sub-section 9, to transfer to the tenant any part of the landlord's interest, "either in the holding, *or in the improvements* thereon." I myself, at page 178, gave the case of one man with a good piece of land, another man with a bad piece of land, each holding at the same rent; each man spends the same amount in improvements; to one, the land, being good, returns three or four times as much as bad land returns to the other. It did appear to me that if I was asked to fix a fair rent on those holdings, the landlord ought to get more for the good land than for the bad; on that point we were all unanimous, and I do not think I need refer further to it.

Question 3,363.—It will save time hereafter if we can just get now a clear idea of this point. In saying that the tenant was to be protected in respect of what he had expended, you did not say, and did not mean to say, that the rest of the letting value was necessarily to go to the landlord? Not only not the whole of it, but in every passage in which it is referred to, it is stated that the interest of landlord and tenant respectively in that remainder was to be had regard to.

Question 3,364.—And the discretion of the Court, applied to that question of respective interest, was to

be the test of the disposition of the remainder? Yes; but there were cases in which it would all belong to the landlord, and there were cases in which nearly all of it might belong to the tenant. For example, in the case I have put, of a man spending £100, suppose the letting out of a river, and the spending of £100, would clear a country-side, I suppose when the man had got back his money, by his enjoyment under his tenancy, and so forth, the inherent quality of the land would be the landlord's. I cannot answer it better than that.

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Question 3,365.—All that is at the discretion of the Court below by the Judgment in *Adams v. Dunseath*? I do not like to use the word "discretion," because that may mean that it leaves them to do what they like. *Adams v. Dunseath* did not leave them to do what they liked. It defined what was meant by the interest of the landlord and the interest of the tenant; the definition was limited by law; and then it said: you are to have regard to those two interests; but how much should go to the one, and how much to the other, is for yourselves to decide.

Question 3,366.—At any rate it is clear that the fact that the tenant was to receive back the money he had expended for improvements, did not of itself involve or contain any conclusion as to what was to be done with the rest of the letting value? Legally, certainly not; but, on the other hand, I am now dealing with the question with which I have nothing to do, that is, the mode of valuation. If the Sub-Commissioners, in the first instance, or the Land Commission had given the tenant something very liberal by way of allowance for outlay, then I would take it that they had compensated his interest. It was for them to say how much belonged to the landlord, and how much belonged to the tenant; and in what way they set about doing that was for themselves. If, in the first instance, they gave him 20 per cent., that might be enough for his whole interest;

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if, on the other hand, they only gave him 4 per cent., and there was a large increase of letting value, they ought to take into account how much belonged to the inherent quality of the land, and how much was fairly referable to the tenant's interest. The mode of valuation is a mystery to anyone except a valuator ; and I am not a valuator.

Question 3,369.—The second question turned upon the meaning of “predecessor in title”? That is quite different ; and the second question really depended upon the effect of the Act of 1881, section 7, which was an amending statute passed with regard to a particular decision ; and I do not know whether you have had that decision fully before you or not.

Question 3,370.—It is *Holt v. Harborton*, which was decided before I was on the Bench, and in which I was counsel for the tenant. There is a provision in the Act of 1870 enabling a tenant during his lease to register any improvement that he has made, with a view to claiming compensation when his lease runs out. Holt was a tenant who had taken a lease after he had made certain improvements, including, amongst the rest, I think, the building of a valuable house. He applied (under my advice) to register his improvements because the lease was a long one. Lord Harborton was the landlord. At the end of the lease Holt might be dead, and they might not be able to prove what he had done. He had put into his schedule of improvements things done before the lease and things done after the lease. The case was argued before the Appeal Court under the Act of 1870. It was a very large Court, consisting of nearly all the Judges ; and it was held that “predecessors in title” meant “predecessors in *the same* title,” and that the lease was the root of the title, and that he could not register, and, therefore, could not get compensation for improvements made before that lease. I was quite certain that the Act of 1881 was intended to alter the effect of that decision.

Question 3,372.—This second question in *Adams v. Dunseath* (in which the Court was four to three in favour of the tenant) turned entirely on the effect of the Act of 1881, section 7.

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Question 3,373.—The point of section 7 is—is it not?—that the tenant on quitting the holding shall not lose his right to receive compensation by reason only of the determination, by surrender or otherwise, of the tenancy? There are three clauses, and they are correlative. The first one is section 7: “A tenant on quitting the holding of which he is tenant shall not be deprived of his right to receive compensation for improvements under the Landlord and Tenant (Ir.) Act, 1870, by reason *only* of the determination, by surrender or otherwise, of the tenancy subsisting at the time when such improvements were made by such tenant or his predecessors in title, and the acceptance by him or them of a new tenancy.” The second paragraph refers to surrenders. But there is also the third paragraph: “The Court, in adjudicating on a claim for compensation for improvements made before any such change of tenancy or tenants (these words were all discussed in *Adams v. Dunseath*), shall take into consideration all the circumstances under which such change took place, and shall admit, reduce, or disallow altogether such claim, as to the Court may seem just.”

Question 3,377.—Upon this point the Lord Chancellor, the Master of the Rolls (Sir Edward Sullivan), the Chief Baron, and myself were in favour of the tenant; that is, that the meaning of “predecessors in title” had been widened under the facts of this case.

Question 3,379.—The other three Judges, the Lord Chief Justice, the Chief Justice of the Common Pleas, and Lord Justice Deasy, were of opinion, because there was no express reference to “predecessors in title,” nor any new definition that altered the meaning of it, that it still meant “predecessors in the same title;” but the

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rest of us, particularly having regard to the words "change of tenancy or of tenants," all held, that as long as you have a string of tenants with the same holding, the giving up one tenure and the taking of another was immaterial, and that the meaning of "predecessor in title" was, therefore, widened by the Act of 1881, section 7.

Question 3,383.—The "predecessor in title" was held to be extended by the Act of 1881 to cases such as *Holt v. Harberton*; and we held that the tenant was not deprived of compensation for improvements, where those improvements had been made by either himself or anyone who was his predecessor in title in the holding, as distinguished from the lease.

Question 3,386.—Now as to the third question. The third question was, whether the 4th section of the Act of 1870 (the final paragraph of it) was applicable to rent-fixing under the 8th section of the Act of 1881; is not that so? The first large question decided by *Adams v. Dunseath* was what I have said about improvements and letting value; the second decided the effect of the Act of 1881 on the Act of 1870. The third is on the Act of 1870, and is really a corollary on the second point about improvements, which was involved in the first question.

Question 3,389.—I am now on the third question, which was, whether the provisions of the final paragraph of the 4th section of the Act of 1870, as to a tenant claiming compensation for improvements made before the Act, are applicable to such improvements in determining what is "a fair rent under the Act of 1881, section 8."

Question 3,390.—Six Judges held that the provision in question did affect the matter; one Judge that it did not; the one being the Lord Chancellor.

Questions 3,391-2.—The Court was six to one in favour of reading both Acts together; but I think all

six held that the effect to be given in fixing the *amount* of rent was not before us, and was to be determined subsequently. The amount was a matter of discretion, but limited, as already explained.

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Question 3,394.—At page 134 you will find the Lord Chief Justice May says: "With respect to the operation of the final clause in the 4th section of the Act of 1870, it would seem that such deductions and allowances as were there spoken of should be considered in fixing a fair rent, so far as they can be regarded as elements of compensation by the landlord within the meaning of the 9th sub-section." You will remember that "compensation" is in the Act of 1870; "fair rent" is in the Act of 1881; and, therefore, whenever "fair rent" and "compensation" are mentioned together, the two Acts are read as one. Now, here is what he says: "Questions of this nature involve matters of fact rather than matters of law, and can be satisfactorily determined only when the proper elements are submitted to the constituted tribunal."

Question 3,295.—That is Lord Chief Justice May. He differed from us on the other point. Now I go to Sir Edward Sullivan (page 141). There is a long paragraph; but it is all summed up on page 141: "In reference to the third question, the very considerations I have just stated" (these were about the interpretation of "predecessors in title") "induce me to think that the positive enactments as to improvements before 1870, as mentioned in the final clause of section 4 of the Act of 1870, must still apply. The two Acts, by the express enactment in the statute of 1881, must be construed as one; that is, as one code. The provisions of the final clause in section 4 of the Act of 1870 are just as mandatory as those of sub-section 9; and in the statute of 1881 there is no declared intention of repealing it. Under such circumstances the rule of construction is that they must stand together if they can be reconciled.

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I think they can stand together, and that the exemption as to improvements, in the 9th sub-section, must operate on improvements made before the passing of the Act of 1870, with all the qualifications attaching thereon." And further down he says: "If one reads the 9th sub-section *per se*, he would at first sight be disposed to give the word 'improvements' a very wide interpretation; but when we find in the very statute in which this word is used a peremptory direction that its meaning shall be taken as in the former Act of 1870, the rule is at once enforced that that interpretation must be abided by, the context not offering any obstacle." Chief Justice Morris, at page 148, as to the third question, says: "The Commissioners, in order to determine a fair rent under the 8th section, have to regard the interest of the landlord and tenant respectively. The interest of the former is the plenary interest in the holding, save so far as the tenant establishes in diminution claims under the Acts of 1870 or 1881. These claims constitute the tenant's interest. What is the tenant's claim under the Act of 1870, in respect of improvements made before the passing of that Act?" And he then discusses that, and shows that it is "a claim to be compensated by enjoyment in the various degrees of time, etc., as set forth in section 4." Chief Baron Palles, at page 160, says: "As to the third question, being of opinion that that which has been exempted from rent is not the entire work, but the uncompensated interest of the tenant in that work, it necessarily follows that I am of opinion that enjoyment by the tenant of improvements executed before the passing of the Act of 1870, is to be taken into consideration in reduction of the tenant's interest in such work, cannot be excluded from consideration in determining fair rent." He says (page 161) that the effect of the opposite view "would be to transfer to the tenant all the property of the landlord in improvements which

had been effected by the tenant, notwithstanding that some of such improvements had, under the provisions of the 4th section of the Act of 1870, become parcel of the holding, without liability upon the landlord to pay any compensation in respect of them; and that the amount of compensation payable in respect of others had been materially reduced by enjoyment." And Lord Justice Deasy, at page 175, refers to the final clause of 1881, section 8, sub-section (1), about hearing the parties, and having regard to their interests; and he says: "It is impossible to frame words giving a larger discretionary power. What authority have we to limit the Commissioners in the exercise of that power without which the Act could not be carried into practical operation?" And lastly, at page 183, I venture to say, "The third question is little more than a corollary to the second question, upon what I will call the principle of uniform and consistent interpretation applied to both Acts. The final clause of section 4 of the Act of 1870 is not repealed. Section 7 of the Act of 1881 expressly deals with rights to compensation under the Act of 1870; and no such right could escape the operation of that clause; therefore, a provision which confers no new right, but in terms only saves the tenant from the deprivation of a right otherwise conferred, cannot exclude restrictions which were concomitant upon that right from its origin. Thus if the prohibition to allow rent in respect of improvements must, as I think it must, apply only to the tenant's interest in those improvements, and if that interest is, for the purpose of fixing a fair rent, to be ascertained by reference to the amount which would compensate the tenant for it if he were quitting his holding, it follows that the third question must be answered in the affirmative."

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Question 3,396 and seq.—The Lord Chancellor's view is expressed in two passages; he had two strong views.

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Number one you will find at page 124. The way he gets out of the Act of 1870, section 4, is by saying: "This is not a proceeding under that enactment; and, moreover, this general direction that the Court in fixing fair rent shall have regard to the interest of the landlord and tenant respectively, and consider all the circumstances of the case, is, it seems to me, designedly controlled and explained by the specific provision of the 9th sub-section, which enacts that no rent shall be allowed or made payable in respect of any improvements whatever belonging to the tenant." You at once see that the point at issue was whether it was controlled and explained by that provision only, or whether it was not controlled and explained by the other provisions also; and the moment the Judges came to the conclusion (as we, six of us, did) that the two Acts, as a whole, must be read together, that put him in a minority, and in a difference of opinion with us. But here is another passage which was very important. On page 125 he corroborated and supported his view by this passage: "Now, it appears to me that by the first clause of the Act of 1881 all tenants throughout Ireland are in this respect placed practically in the same position as the Ulster tenant;" and then he proceeded to deal with the case of the Ulster tenant, and to show the effect of his being entitled to free sale without taking improvements into account, which is only in the case where the Ulster custom is unrestricted. He based a great deal on that. Now, the other Judges met that, and it is important you should see how. In the first place, put shortly, if Parliament meant that, instead of enacting 62 sections in 1881, why did they not pass one defining something like the Ulster custom, saying: "All that shall apply to Ireland all over"? You observe the answer, given more in detail by Sir Edward Sullivan, at page 143, by Chief Baron Palles at 160 and 161, by Chief Justice Morris at 153, and by myself at page 176.

Question 3,408.—Before you pass away from the third question I should like to ask you whether the effect of your decision on the third question was, that the Court, in considering the interest of the tenant in the fixing of a fair rent, is to treat the interest of the tenant in regard to improvements as it would treat his interest if, under section 4 of the Act of 1870, he was seeking compensation on quitting his holding?—Yes; it is not a strict measure, you are aware; but in ascertaining the tenant's interest, you are to look and see what he would get for that interest if he was quitting his holding; and that is put by Sir Edward Sullivan very clearly at page 141: "The right of the tenant to get compensation for his improvements, and his right to be exempted from rent in respect of them, being, according to my view, almost, if not entirely, correlative." A man cannot be entitled to sell one thing and possess another; that would be depriving the landlord in one case of rent for the thing he would get for nothing when the lease was over; and, on the other hand, the tenant might by improvement and increased letting value diminish the landlord's rent beyond what the landlord's interest was worth. There is no doubt (I think I have said that before) that the subject-matter of compensation, by reason of these two Acts being read together, is a guide to the subject-matter of the interest.

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Question 3,409.—Now, on the fourth point, whether you were unanimous in saying that the tenant was not compensated by enjoyment under the lease?—We were unanimous that if a tenant takes a lease for a term at a fixed rent, that that rent represents the price of the entire enjoyment of the place during the term, and that no profit derived from that can be treated as compensation "by the landlord." The landlord has got his price for the whole term in his rent, and, therefore, enjoyment under a lease is not compensation by the landlord; of course, that is express "compensation by the landlord,"

Adams as distinguished from a thing to be taken into account
v. on the last clause of the 4th section. The Court was
Dunseath. quite unanimous on that point.
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Question 3,410.—That the rent pays the landlord for the inherent capacity of the soil as well as everything else? During the lease, but only during the lease. The way that arose in *Adams v. Dunseath* was, because it was stated on the case that, in fixing the rent of this holding in 1845, they had thrown out all consideration of improvements, house and everything else.

Questions 3,411 to 3,414.—You were going to tell us about the house; that point was raised on the fifth question submitted, was it not? Yes.

Did the lease preclude the tenant from being regarded as having any interest in the house before the lease was made? This was the only one of the five questions that was a specific question dealing with the particular facts of this individual case, and it was: Does the lease of the 2nd March, 1846, preclude the tenant from being regarded as having any interest in the house for the purpose of these improvements, the house having been built before the lease? On that point it is right to tell you that no Judge in the Court held that the tenant was entitled to have that house rent free, or treated as his; what three of them did say was, that he was not *necessarily* liable to rent for it. He might, or he might not, according to the view taken of the transaction; I want to make this perfectly clear, because I have been stated to have reversed the decision of the whole Court. I want to show you what really happened.

Question 3,415.—The Judges were three to three. As junior Judge I came last. There has been a misapprehension about the Judgments of the others, if I may be permitted to say so. At page 129 this is what the Lord Chancellor says:—"Whether the transaction ought to be differently viewed depends now on its substance, not, as before, upon its mere form; and in this

case, if the Court, after due investigation and full consideration of all the circumstances under which this particular change of tenancy took place, came to the conclusion that the lease was in fact given in consideration of and as compensation for the building of the new dwelling-house, then, of course, the present tenant should not be regarded as having any claim in respect of it, or as entitled to object to rent being allowed for it. This, however, is a matter of fact for the Commission to deal with, and not one of law, on which we can pronounce any definite opinion beyond this—that there is nothing in the lease, as I conceive, to exclude the application of section 7 to the house built before its execution.” Nothing can be clearer than that. Sir Edward Sullivan, on page 145, says:—“As to the operation of the lease of 1846, this is unquestionably a point of much practical moment. It has, of course, all the recommendation of a new and safe starting-point as between landlord and tenant ; but I must confess I cannot think that by itself it bars the tenant’s claim.” And he says, further down:—“The Land Commissioners must, I admit, carefully review the whole state of things accompanying the change of tenancy, and rule upon it. It would, of course, be of the utmost moment to get a starting-point ; but this must and should be one clear and safe beyond any doubt.” Chief Baron Palles, on page 164, goes through all the facts, and then he says:—“These are the only facts in relation to this question found by the case ; and it is to be remembered that by the section of the statute under which this case is stated, our jurisdiction is to determine questions of law *only*. We are not at liberty to assume facts, or even to draw an inference of fact from facts stated in the case.” Now, my view may be put shortly. Before I go to that, you will observe that the other three Judges had held that all the improvements made before the lease were excluded and, therefore, they had nothing more to say about the

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house. The house was out in their view, on another ground altogether. By a new tenancy, therefore, they did not discuss this matter at all.

Question 3,417.—They answered that question on the same ground as that on which they had answered No. 2? Yes; they had got their view laid down in the case of *Holt v. Harberton*, and, therefore, they had nothing further to say on this point.

Question 3,418.—Their answer to No. 2 answered No. 5? Yes, but the other three (whose Judgments I have read) held that this lease did not necessarily exclude the tenant, and my view, that it did, turned on the point, what effect was to be given to the word *only* in the Act of 1881, section 7.

Question 3,419.—By section 7 of the Act of 1881? Yes, I would like to read this passage, because it puts this beyond all doubt; page 168. The Chief Baron knew perfectly well what he had to answer, and what my Judgment was, for we had discussed all this case together. "It may be said, and I have no doubt will be said" (he knew what was coming) "that in this construction I am giving no effect to the word 'only' in the section, 'the tenant shall not be deprived of his right by reason *only* of the determination of the tenancy.' I answer that effect may and ought to be given to the surrender of the new tenancy, but only as one of several circumstances, all material upon the question of accord and satisfaction." And in the last paragraph on that page, he says:—"I wish it, however, to be distinctly understood that I give no affirmative opinion that the tenant is *entitled* to compensation for the house. Before doing so I should have the determination of the Commissioners upon the matter of fact that the lease had not been executed in satisfaction of the claim."

Question 3,420.—They held that the lease settled nothing, one way or the other? That it was possible

he might have it, but that it was for the Commission to say whether he was or was not entitled to compensation. Finding that the landlord had paid £6,000 in 1851 for the estate, subject to 30 years in the house, and finding that the tenant in 1845 had only bought 30 years in the house for £260, I came to the conclusion that the landlord had bought the house from 1875 out, that the tenant had never bought it, and that it represented so much landlord's money, and no tenant's money; and I held that that lease of 1846 was, under the circumstances, a new starting-point; I was strengthened by some other sections that I think have been referred to already: 1870, section 4 (1) c, as to "valuable consideration," and section 5 (1), as to improvements made before an actual sale of the landlord's interest; and the landlord here had got what he imagined to be a parliamentary title; he bought it in the Encumbered Estates Court in 1851, subject only to the lease for 30 years: and that was the ground on which I thought this was not a case of change only in the tenancy, but that the circumstances were such that in the particular case the particular tenant was not free from rent on the house. It was sent back. I apprehend that they must have considered that the landlord's interest was not the whole value of the house; for they added £2 to the rent in respect of the house.

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Question 3,425.—*Adams v. Dunseath* stands as it did in 1882 at the present time. We have never had any other case exactly on the same matter. We have had a couple of cases since bearing on the same question, but not directly.

Question 2,978.—The Act of 1870 first legalized Ulster usages in the plural. It gave legal effect to whatever usages came under the common definition of the Ulster custom, but it left those usages to be proved in every case; and they varied very much, indeed, in different estates; they had a common nature, but the limitations

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were very numerous and very striking. Every Ulster tenant got his choice. He could either come in under the Act of 1870 as an Ulster tenant, or he could claim his right as an ordinary tenant. I had a good deal of experience at the Bar and elsewhere—and some special experience, too—about this Ulster custom; and I should say that whether he would claim as an Ulster tenant or claim as an ordinary tenant depended in each case on the usage he knew he was able to prove on his own estate. He had the power (this is established by decision) to prove that his was an Ulster custom estate, by showing that all the land round it was affected by custom; but beyond that he had to prove, as a rule, what the custom was on his own estate: on many estates specific customs are capable of being actually proved. However, the effect of the Act was very simple—it made these usages when proved binding; previously they were not binding at all in law, but they were enforced by very strong sanctions in many cases.

Question 2,983.—An ordinary tenant got two rights under the Land Act, 1870: he got compensation for disturbance if he was put out by the act of his landlord, limited in amount, and limited also by certain special provisions; and he also got compensation in all cases, that is to say, whether put out by his landlord or going out voluntarily, for his improvements. “Improvements” were defined, and the definition was a curious one; because the leading word by which “improvement” was defined was the word “work.” The amount of the compensation was subject to limitations. These are all to be found in the Act of 1870, and they are important still; the tenant could not claim compensation for improvements more than twenty years old, unless they were buildings or reclamation. He could not claim for any that were injurious to the landlord’s estate; and by a clause of importance (section 4, sub-section c) he could

not claim for improvements executed in pursuance of a contract for valuable consideration. The Ulster
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Question 2,984.—That meant that if the tenant had got in money, or in money's worth, anything from the landlord for his improvement in consideration of executing it, he could not claim compensation for it again, he having been, as it were, paid for it once already ; but the consideration, of course, must have been a consideration coming from the landlord. There was an idea, I think, that it must be actual cash ; but that matter was considered in *Adams v. Dunseath* ; and I think the general opinion, and certainly mine, was, that if a landlord, for example, made a lease to a man for a certain term, and by agreement the rent was made lower than the actual value, and in order that the tenant might reclaim or might do anything of that sort, then he would be receiving, in the amount that was taken off his rent because he was to make the improvement, money's worth. Anything he did under a bargain for value he could not be paid for again, having got the value. And there was also a very important final paragraph in section 4 on the same subject, by which, in reduction of the claim, but not in extinction of it, length of enjoyment and some other things were to be taken into account. There were other exceptions—contravention of contract, improvements made by the landlord, &c. ; and there were certain cases in which compensation was expressly excluded—thirty-one years' leases, except buildings, reclamations, and manures, and cases where the tenant was permitted to sell, and did not sell. Finally, there was an important section which I should mention also—section 18—that all equities were to be taken into consideration ; in fact, they should have fair regard to the interest of the landlord and of the tenant, and to all the circumstances.

Questions 2,991-2.—Under the Act of 1870 this sum of compensation so ascertained was the interest of the

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tenant. In the case of eviction for non-payment of rent or other default of the tenant, he got the improvements only; if the landlord put him out, he got both disturbance and improvements.

Sub-division.
Bond fide
occupation.

Question 3,470.—No leaseholder can fix a fair rent unless he is in *bond fide* occupation. Many questions have arisen as to what *bond fide* occupation is. For example, several people break up a holding among them; but they do not alter the estate. They all remain liable to the whole rent; it is a common state of affairs. Two Judges—I think in the Exchequer—decided that no lessee was there *bond fide* in occupation of the entire holding. The Chief Baron said, “Yes; they all made what he called a ‘conjunct’ tenant” a conjunct lessee, because they were all liable to the landlord. We held he was right; there was no reason why they could not hold in Co., and the lessees as a body were in occupation; and because each of them was liable to be sued or distrained for the whole rent, we held that as a body they were in occupation, and we affirmed his view. There is a similar case. (I was in a minority of one upon it for the landlord.) The landlord had from time to time taken up parts of the holding; all the rest had remained in the possession of the tenant. Lord Ashbourne and Lord Justice Barry also invented a word there; they said he was in occupation of an entire holding created by “shrinkage.” That was *Nagle v. Galbraith*. (See Report, *post*.) *Ireland v. Landy* was the name of the previous case. Then there were cases in which the question was whether holdings had been consolidated or not, or were separable—*Domville v. Dunphy* and *Bourke v. de Robeck*. Questions of that sort arise frequently.

REPORTS OF CASES.

LAND COMMISSION.

(Before BEWLEY, J., & FITZGERALD, Q.C., Commissr.)

Marquis of Headfort v. Cochrane.

Jurisdiction to grant Limited Administration where there is an unproved Will naming an Executor.

THE Sub-Commission, on the hearing of an application to fix the true value of a holding, appointed a person nominated by the landlord limited administrator, for the purpose of selling the tenancy. The executor of the tenant, not having taken out Probate, or nominated any person to act as limited administrator, the executor took out Probate after the date of the Sub-Commission Order, and appealed therefrom, and also from the Order fixing the true value.

Land Com.
March 11,
1892.

Held, that the Court has jurisdiction, for the purpose of carrying out a sale, to appoint a limited administrator of a deceased tenant who died leaving a will naming an executor who had not taken out Probate.—I. L. T., xxvi., 112.

LAND COMMISSION.

(Before BEWLEY, J., & FITZGERALD, Q.C., Commissr.)

Murray v. Scottish Provident Institution.

Agreement and Declaration fixing Fair Rent, filed in Court—Consent that same be taken off the file—Jurisdiction of Land Commission, Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), s. 8 (6).

Land Com.
December 1-8,
1893.

Agreements and declarations fixing the fair rents of tenant's holding, were duly filed in Court pursuant to sec. 8 (6) of the Land Law (Ireland) Act, 1881. Many years afterwards an application was made, on consent, that same be taken off the file, in order that originating notices might be served and fair rents fixed by the Land Commission.

Held, that the Land Commission had no jurisdiction to make the order, the agreements and declarations being regular in form and untainted with fraud.

Evans v. Peyton, 7th November, 1893, referred to.—
I. R., 1894, vol. ii., 44.

LAND COMMISSION.

(Before BEWLEY, J., & FITZGERALD, Q.C., Commissr.)

King v. Pilkington.

BEWLEY, J.—The house in this case is 44 feet long, 22 feet deep, and 18 feet high. It was, in fact, a very magnificent farm-house. The landlord was an ordinary farmer, and his brother, who was jointly interested with him, was a National School teacher. Their father, under whom they derived, was a land steward. It surprised the Court that the Sub-Commission, presided over by a very able legal member, should have seen their way to hold this was demesne. The Court were of opinion that this was in no sense demesne, and reversed the Order of the Sub-Commission, dismissing the originating notice.

Land Com.
1892.

[Not reported.]

SUB-COMMISSION.

(Before TRENCH, Q.C., A.L.C.)

Jeffers v. Byrne.

Lease for lives renewable for ever—Covenant giving liberty to cut all trees—Evidence of user.

TRENCH, A.L.C.—The lands consist of 26 acres, 1 rood, 35 perches. They were originally demised to a Mrs. King, by lease, for lives renewable for ever, bearing date the 18th July, 1823. I think that the term being

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practically a perpetuity, though by no means conclusive of the matter, is an element to be considered, because it is not likely that a landowner would let for ever a holding which he intended to be kept as a residence. What is the description of the thing demised? It is "all that and those the town and lands of Upper Bogganstown, formerly in the possession of J. Trench, Esq., and now in the actual possession of the said Alicia King, containing 16 acres, 2 roods, and 1 perch, Irish measure, be the same more or less, on which said lands a slated dwelling-house was erected, and other improvements made thereon, and it was known by the name of Landscape." Here it will be seen that the lands were the first and apparently the principal thing demised, for the buildings come in in a peculiarly cursory manner. This certainly does not seem to be the language that would be used in the demise of what was intended to be a residence and not a farm. As a further aid to coming at what was the intention of the parties, we may turn to a recital in the lease which is in these terms:—"And whereas it hath been agreed by the parties hereto to make a lease of said lands." The lands had been referred to in an earlier recital; but in neither is there any mention of a dwelling-house or residence. Further, this lease contains a clause enabling the lessee to cut down every single tree on the place, and sell them. I cannot conceive the parties contemplating a residential letting, and, at the same time, the tenant being permitted to denude the place of its arborial ornamentation.

Having carefully considered all these matters, and also the tenant's evidence, that, though a grocer, he is also a farmer; that he took this holding as a farm, with a residence, and would not have taken it but for the land, I have come to the conclusion that it is not a residential holding, and that a fair rent should be fixed.—I. L. T. R., xxvii., 388.

SUB-COMMISSION.

(Before GREER, A.L.C.)

Magowan v. Lindsay.

Application to fix a Fair Rent under the provisions of the Redemption of Rent (Ireland) Act, 1891. The lands were held under a Fee-Farm Grant, dated the 30th December, 1862.

The facts of the case appear in the Judgment.

GREER, A.L.C.—This is an application under the Redemption of Rent (Ireland) Act, 1891. The holding, which contains 22 acres, 1 rood, and 2 perches, is held under a fee-farm grant dated the 30th December, 1862, made by John Lindsay to John Kinley Tener. It recites an original lease dated 20th April, 1826, executed by one William Stewart to John Kinley Tener, for lives renewable for ever. In that demise the lands are described as “all that part of the town and lands of Moree, containing 22 acres, 1 rood, 2 perches, English statute measure. The evidence established the fact that at that period (1826) the buildings upon the farm were of the ordinary description, and that the lessee having acquired other lands (some 102 acres in extent), he proceeded to erect a substantial residence upon the holding, and he planted and otherwise improved it. This must be conceded, as I find the holding subsequently described in the grant of 1862 as “that part of the town and lands of Moree on which the mansion, dwelling-house, and offices now stand, and surrounding same,” &c. By that grant the timber and fruit-trees are reserved to the grantee, who

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covenants to keep the buildings, &c., in repair. In the year 1893 the present applicant purchased at auction the interest of the grantee for a valuable consideration. These are the simple facts of the case, and upon which Mr. Kelly, for the landlord, contended that the applicant was bound, by the description of the premises, as given in the fee-farm grant of 1862, under which he purchased, and that the Court should hold that the holding was residential in its character, and consequently excluded from the operation of the Irish Land Acts. Mr. Kelly referred the Court to the cases of *Doyne v. Campbell* and *Spunham v. Walsh*; but those decisions cannot be regarded as authorities in determining the present application. In *Doyne v. Campbell* the holding was residential in its character when it was originally taken, and it was clearly in the mind of both landlord and tenant that that was the object and purpose of the letting; whilst *Spunham v. Walsh* possessed the element of a public-house, which was included in the letting. Neither of those cases has any analogy to this application, which must, so far as the legal element is involved, be dealt with upon the principle which it appears to me should govern it—namely, what was in the contemplation of the lessor and lessee at the time the original lease was executed in 1826, and what was the subsequent use made of the holding. Now, reading that demise in the light of the evidence given at the hearing, there can be no doubt that the holding was originally granted for agricultural purposes; and, that being so, has anything since arisen to alter or change its character? From a legal point of view I am of opinion that the holding has not changed its character. It is still “the town and lands of Moree,” with an enlarged house now erected upon it by the tenant, and with offices suitable for a larger holding which the tenant holds under the same landlord, and uses in connection with it. In dealing with the buildings, if the

holding stood alone, they must be regarded as in excess of what is actually required for the equipment of a holding of 22 acres. The inspection of the holding has shown that the term "mansion-house," as given in the fee-farm grant, is somewhat exaggerated, and, whilst in the ordinary acceptation of the term it is a place of habitation, it does not, as my colleagues inform me, answer the enlarged appellation of what is usually known as the mansion-house of an owner's demesne, and the buildings, if considered in connection with the larger holding of the tenant (102 acres), and which he holds at a judicial rent, could not be said to be in excess of what is necessary to work the entire lands in tillage rotation. Yet that is an element which cannot be considered by the Court in fixing a fair rent. There is no provision in the Irish Land Acts which would entitle the Court to so appropriate the unsuitable buildings of one holding to the equipment of another holding which is not before the Court. We must, therefore, in this case, deal with the excess buildings as the Commissioners dealt with similar buildings in the case of *Robb v. Downshire*, where they held that such a class of improvements were unsuitable to the holding, and did not fall within the definition of improvements given in section 70 of the Irish Land Act of 1870. Upon the whole case, therefore, and having regard to the dictum of Mr. Justice Bewley in the case I have referred to, we fix the judicial rent at £22 10s., and we declare £7 10s. of that sum to be assessed in respect of buildings.

NOTE.—Under the provisions of section 1, sub-section 3, of the Land Law (Ireland) Act, 1896, the buildings referred to in this Judgment would now be exempt from rent.

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(Before GREER, A.L.C.)

Anderson v. Ffolliott.

Land Laws—Residential holding—Lease—User—Social status of tenant.

A holding of 78 acres was held under the usual form of agricultural lease for lives, at a rent of £81. The original demise was made to a country gentleman; the interest subsequently vested in his son, also a gentleman and collector of barony cess. It was in the immediate vicinity of Sligo, surrounded by residences of professional gentlemen.

Held, not to be a residential holding, and a fair rent fixed.

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GREER, A.L.C.—The lands in this case are held under a lease, executed in 1824, for three lives or thirty-one years. Mr. Fenton, for the landlord, sought to establish that the holding was a residential one, and, therefore, excluded from the operation of the Land Acts. He relied on the fact that the demise was originally made to a person occupying the position of a country gentleman, and that the interest in it subsequently became vested in the son of the lessee, who was also a gentleman and a collector of baronial cess; that the lands were in the immediate vicinity of Sligo, and surrounded by the residences of professional and other gentlemen; and that the buildings upon the holding were more suitable for residential than agricultural purposes. I have given the evidence the fullest consideration, and I fail to discover any element that would remove the holding out of the category of what are now regarded as ordinary agricultural holdings within the meaning attached to such by the Irish Land Acts.

The lease of 1824 is in the usual form of an agricultural lease ; and there is nothing whatever upon the face of it which would impart a residential character to the holding. The quantity of land demised, 78 acres, 1 rood, 32 perches, and the rent received, £81 7s., strongly point to the fact that at the date of the demise both the lessor and the lessee regarded the holding as one that was to be worked for profit, and not to be occupied as a mere residence ; whilst the evidence as to the continued user of the holding strongly supports the conclusion that the holding is essentially one that a gentleman farmer would wish to occupy.

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In the case of *Moonan v. Conyngham* (28 I. L. T. R. 117) FitzGibbon, L.J., deals very exhaustively with the question as to how far the social *status* of the tenant and the excessive value of the buildings upon the holding can affect its agricultural or pastoral character for the purposes of the Land Acts. With regard to the tenant's *status* or occupation his Lordship says :—" The position of the man is unquestionably to be considered in determining whether he has taken the place as a residence, with land as an accessory, or has taken a farm with a residence upon it. But it is no more than evidence ; and if a gentleman takes an agricultural holding, he is not to be put out of the Act because he makes the house upon the holding more suitable for the residence of a gentleman than it would be for that of an ordinary tenant farmer."

In this case, no doubt, the farmer took the holding with a superior dwelling-house existing upon it ; and he made additions to the offices so as to render them suitable for cattle and horses : and I cannot but regard those facts as strongly supporting Mr. Hynes' contention for the tenant, that the lands were originally let for agricultural purposes. The house is the landlord's, and we have dealt with it by including the value of it in the judicial rent of the holding, which we fix at £65.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before Lord ASHBOURNE, C., FITZGIBBON and
BARRY, L.JJ.)

Magner v. Harris.

*Redemption of Rent (Ireland) Act, 1891—Land held
under lease for 900 years—Included with Demesne
Lands—Held to be agricultural.*

Appeal.
May, 1896.

The Sub-Commission (Doyle, A. L. C.) dismissed the tenant's application. The Land Commission confirmed ; tenant appealed ; Supreme Court reversed, with costs.

The landlord is Mrs. Josephine Harris, of Kilgarrive, Ballinasloe. The holding consists of 29 acres of land, near Blackrock, in the County of Cork, now held by Dr. Magner as assignee of a lease made on the 28th August, 1873, to Mr. Crawford, who was formerly a well-known brewer in the City of Cork, for 900 years, at a rent of £150 a-year. The Land Commission had held that the case was one of those in which land taken into a demesne thereby became demesne land, and excluded from the operation of the Land Acts. The question in the case was substantially whether the land in question was agricultural or pastoral in its character, or partly both. The Lord Chancellor gave judgment allowing the tenant's appeal, with costs, holding that there was nothing on the face of the lease to indicate that the premises included in it were not to be used like any other land at the will and discretion of the lessee, and that no acts had been done to incorporate the lands with demesne lands.

FitzGibbon and Barry, L.JJ., concurred.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before Lord ASHBOURNE, C., FITZGIBBON and
WALKER, L.JJ.)

Nicholson v. Marquis of Headfort.

*June 17, 1896.—Land Laws—Pasture holding—Purpose
of letting—Demesne lands—Land Law (Ir.) Act,
1881, s. 58 (3).* Appeal.
June, 1896.

The lessee of a holding of nearly 200 acres covenanted that he would labour, crop, and farm the same in a husbandlike manner in respect of the succession of crops, and so that at all times there should be at least 140 acres under grass. The holding was demised by the lease to a salesmaster, and had always been used as a pasture farm :

Held, that the holding was not let mainly for the purpose of pasture.

The Sub-Commission (Bailey, A. L. C.) dismissed the tenant's application. The Land Commission affirmed ; the tenant appealed ; appeal allowed.

LORD ASHBOURNE, C.—The holding, which is situate in the County Meath, contains 199 acres, 2 roods, and 27 perches. It is held under a lease dated January 15, 1877, and made by the Marquis of Headfort to Mr. Peter Henry, a well-known salesmaster. The lessee's interest under the lease was assigned in 1883 to Mr. Nicholson, of Balrath, who is the tenant claiming to have the fair rent of the holding fixed by the Land Commission.

The lease contains (amongst others) a covenant by the lessee not to build "any farmers' dwelling-houses, labourers' houses, or any cottage, hut, or other mesuages," except with the consent of the landlord, in writing ; a covenant "to consume on the demised lands

Appeal. all the hay, straw, and chaff that shall arise thereon;"
 June, and a covenant to labour, crop, and farm the demised
 1896. premises in a good and husbandlike manner in respect
Nicholson of the succession of crops, and so that at all times there
 v. shall be at least 140 acres under grass. The lessee thus
Headfort. has liberty to till almost 60 acres—a substantial portion,
 Ashbourne, C. amounting to nearly one-third, of the entire holding.

In all cases where it is alleged by the landlord that the letting was made mainly for the purposes of pasture, and the tenant contends that the holding was demised as a mixed farm, in the first place we must look at the lease itself to see if it discloses what the purpose of the letting was. If there is any ambiguity or uncertainty in the information afforded by the lease, or if it be wholly silent as to the purpose, then it is open to us to look at the surrounding circumstances as showing what must have been present in the minds of the parties at the date the letting was made, and as explaining their intention and purpose. This lease, by the covenant I have referred to, in clear and unmistakable language gives the right to the tenant to till nearly one-third of the holding. Are we to look outside the lease, away from this covenant, to extrinsic facts, to collect that in the mind of the parties this holding was let to be used mainly for the purposes of pasture? Would not this be to admit evidence, not to explain, but to contradict, the plain intendment of the lease?

It has been said that the tenant has not availed himself of his powers, and that the land remains in his hands unbroken. No undue weight should be given to this circumstance. Under the lease he has a right to break up 60 acres in any year. Can it be urged that he has lost this right because he has not yet availed himself of his option?

It must be borne in mind that the onus in cases of this kind rests upon the landlord who seeks to shut his tenant out of the benefits conferred by the Land Acts.

Mr. Justice Bewley, with considerable hesitation, formed the opinion that the circumstances connected with the granting of this lease led to the conclusion that the letting was made mainly for the purposes of pasture. Giving due and proper weight to the terms of the written contract between the parties, I am unable to agree with this conclusion. I am of opinion that the provisions by which the lessor bound himself show that the demised premises were given to the lessee to use as a mixed farm, and that, therefore, the decision of the Land Commission must be reversed.

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FITZGIBBON, L.J.—The purpose of the tenant in acquiring the holding in such a case might be well ascertained from his position and circumstances; but such considerations are not specified in the statutes as tests of exclusion: and there is, in this case, the additional difficulty that Mr. Nicholson is only an assignee, and was not a party to the original letting, the purpose of which is in question. But the insurmountable difficulty in the landlord's way is that nothing can be admitted to qualify or contradict the evidence of the purpose of the letting as expressed or implied by the contract; and beyond doubt or ambiguity this lease shows that a purpose of tillage, to a substantial extent, though under restriction, was present to the minds of the parties when they executed it. The tenant covenants to labour, crop, and farm the said premises in a good and husbandlike manner, in respect to the succession of white and green crops; and it is declared that the landlord makes the lease "in full confidence and upon the express condition and understanding that the lands shall be *cultivated, cropped*, and managed after the manner and according to the terms laid down." The only question, therefore, is whether the restrictions upon cropping prove (and the onus lies on the landlord) that the lands were let to be used wholly or mainly for the purpose of pasture. Even if the restriction upon build-

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ing could be held to extend beyond dwelling-houses, and to apply to farm buildings, which I doubt, the condition of requiring the landlord's consent might be reasonable enough ; the restriction against removal of hay, straw, or manure is really an agricultural covenant, of which the purpose is to secure good husbandry. It not only appears in English precedents of agricultural leases, but substantially the same restrictions appeared in *Drought v. Stubber* (18 Ir. L. T. R. 37), *Holmes v. Lauder* (22 L. R. Ir. 47), and *Westropp v. Elligott* (9 App. Cas. 815); while the quantity of land which might be tilled, namely, 60 acres out of 200, is very much greater than in any of those cases ; far less than this amount of tillage would make the farm, as a whole, a mixed farm. In short, the terms of the lease show that the purpose of the landlord (on whom, I repeat, the onus rests) was not that the farm should be used wholly or mainly for pasture, but that it should be treated in a husbandlike manner by a tenant who, within the prescribed limits, might use it at his option for either pasture or agriculture, and, of course, the purpose and the powers of the tenant, as evidenced by the contract, must be correlative with the purpose and stipulations of the landlord.

It is needless to repeat that in this case there is no physical unfitness for tillage in the subject-matter. The reasons for preferring grazing to tillage are economical, not natural or contractual ; no doubt, the actual user in this, as in all the cases in which it has hitherto been attempted to exclude the tenant from the Land Acts, has been wholly or mainly for pasture. Otherwise, in fact, the question could not have arisen ; but the actual user cannot control the express or implied terms of the contract of letting. The holding consists of a large farm belonging to Lord Headfort ; and though it is surrounded by the estate, and wholly or mainly by the demesne land of Mr. Nicholson, and was, no doubt, taken by him on that account, it was never turned into

demesne land by him, nor incorporated with his demesne, as was the case in *Pratt v. Gormanston*.

An observation made by the Lord Chancellor, in *Holmes v. Lauder*, applies even more forcibly to the present case. The lease was made after the Act of 1870, and expressly refers to that Act for the purpose of excluding money paid by a purchaser from the personal representatives of a deceased tenant, from sec. 7 of that Act; yet it does not purport to bring the letting within any of the statutory exceptions.

WALKER, L.J., concurred.

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SUB-COMMISSION.

(Before GREER, A.L.C.)

Bally v. Newton.

Holding demised by lease for 999 years to the Trustees of Clogher Presbyterian Congregation—Held to be within the Redemption of Rent Act (Ireland), 1891.

GREER, A.L.C.—The lease in this case is dated 28th of December, 1861, and is for a term of 999 years. Prior to 1859 the holding consisted of three different sections—9 acres and 20 perches, held under lease by the Guardians of the Poor Law Union of Clogher, at the yearly rent of £12 7s. 6d.; 4 acres, 1 rood, held by a tenant named Neally; and 3 acres, 2 roods, and 15 perches, in the occupation of a widow named Durneen. The portion demised to the Poor Law Guardians was used by them as “the workhouse farm,” and the two

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other portions were held and used by Neally and Durneen as ordinary agricultural farms. Shortly before the execution of the lease of December, 1861, the Trustees of Clogher Presbyterian Congregation agreed with the Guardians of the Clogher Union to purchase their interest in their lease for a sum of £30. That money was paid, and the surrender of the lease was duly executed. The Trustees, having thus acquired the 9 acres and 20 perches of the holding, subsequently purchased from Neally the 4 acres, 1 rood, and 25 perches, at the sum of £25; and they also acquired from Widow Durneen the remaining 3 acres, 2 roods, for which they paid her the sum of £15; the purchase-money of the entire holding thus amounting to the sum of £70. The Trustees, having so possessed themselves of these three holdings, which up to that time were let and used for purely agricultural purposes, on the 28th of December, 1861, accepted a lease of the whole from Andrew Newton, Esq., the then owner, for a term of 999 years, at the yearly rent of £23 12s. 6d. The premises are described in that demise as lately in the occupation of the three tenants I have referred to. It contains a covenant binding the lessees to erect a suitable manse upon the holding, and to keep the buildings insured in the sum of £500.

Subsequently, and in the year 1892, the Right Honourable Gerald FitzGibbon and the Right Honourable William O'Brien, the Judicial Commissioners constituted under the Educational Endowments (Ireland) Act, 1885, framed a scheme under the provisions of that statute, dealing with the endowments of the Clogher Presbytery; and the said scheme received the final approval of the Privy Council upon the 24th of May, 1892. In that scheme the lease of December, 1861, is included, and is thus described:—"Congregation of Clogher, manse, office, houses, and manse farm attached thereto. Ballymagowan, Clogher, County

Tyrone, 17 acres and 20 perches (statute), Robert M'Cay (surviving trustee), held under lease, dated 28th December, 1861, for 999 years, subject to the yearly rent of £23 12s. 6d." The Reverend William Henry Baily is the present minister of the Presbyterian Congregation of Clogher, and has applied to this Court to have a fair rent fixed upon the holding, under the provisions of the Redemption of Rent (Ireland) Act, 1891.

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Mr. Kelly, solicitor for the landlords, asked me to hold that the land was mainly taken for the purposes of a Presbyterian manse; that the buildings were the dominant portion of the holding; and that, under the decision in *M'Cutcheon v. Lansdowne* (see Report, *post*), the application should be dismissed. I have considered the report of the case referred to, and which is distinguishable in some important features from that of the present application. In that case the proceeding was before the County Court (Judge Hemphill, Q.C.), under the Landlord and Tenant (Ireland) Act, 1870, where the tenant, the rector of the parish, sought for compensation on being disturbed in his occupation of the holding. The area was 17 acres, and the rent was £16 16s. The dwelling-house belonged to the landlord, and the tenant would appear to have got into possession without paying any fine or other consideration. The lands, which had been occupied as a rectory, were ornate and extensive, and were worth £35 a-year, and the house £36 a-year. In this case the predecessors of the present tenant, the Trustees of the Congregation, purchased up the tenant-right interest in these agricultural lands, and proceeded to erect a suitable manse upon them, as they were bound by their covenant to do. Mr. Kelly also contended that the house was too good for the holding, and being unsuitable for an agricultural holding, we should regard the holding as residential, and dismiss the application. Now, under the law as it stood prior to

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the passing of the Land Law (Ireland) Act, 1896, I should in the circumstances of this case have probably been obliged to hold, as I did in *Robb v. Downshire*, that so much of the buildings as were unsuitable to the holding should bear rent to the landlord ; but the Act of 1896 relieves the Court from having to give effect to such a principle, and provides (sec. 1, sub-sec. 3) " that no rent shall be allowed or made payable in respect of an improvement made by the tenant of a holding by reason only of a work constituting such improvement not being suitable to the holding." In this case the lease was executed by the landlord with the full knowledge of how the lands had been acquired by the lessees, and the purpose for which they were to be occupied by the clergyman for the time being of Clogher Presbyterian Congregation — namely, as a " manse farm," and upon the condition that a suitable dwelling-house should be erected upon them. Under all the circumstances of the case, I am of opinion that the main object of the letting was not for a residence, as that object has been defined by the authorities ; that the erection of the manse under the lessee's covenant did not alter the agricultural character of the holding, which was, and still is, a " manse farm ;" and we will therefore fix a fair rent upon it.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., FITZGIBBON, BARRY,
and WALKER, L.JJ.)

Rogers v. Murphy.

Land Law (Ir.) Act, 1896, ss. 6, 50—Pending Proceedings—Meaning of "agricultural"—Land Act, 1887, s. 9—Town-parks.

A notice of appeal to the Court of Appeal being current when the Land Law (Ir.) Act, 1896, became law.

Held, that the case was a pending proceeding within s. 50 of that Act.

County Court Judge held that the lands were town-parks, *i.e.*, within the definition of the Land Acts, but that they fell within the proviso contained in the Act of 1896; and he held that the holding was, therefore, an ordinary farm. The Land Commission reversed, and held that the holding was a town-park, and that the case was not a pending proceeding within the provisions of the Act of 1896. The Court of Appeal reversed that decision, and affirmed the decision of the County Court Judge.

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The holding was let in 1856, as a yearly tenancy, to Thomas Rogers, a butter merchant, who resided in Navan, and who had other lands adjoining, which he tilled. When the present holding was let, it was in the hands of the landlord. The mode of user was ordinary tillage from 1856 till 1876, when the applying tenant, James Rogers, succeeded to the possession with his brother Michael, and the latter dying in 1895, James became sole tenant, and he continued the established practice of tillage. The notice of appeal was current when the Land Act of 1896 passed.

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LORD ASHBOURNE, C.—This appeal raises a town-park question. It appears that the holding is situate near the town of Navan, Co. Meath, and that the acres reach the substantial figures of 17 acres, 3 roods, 18 perches; held at a rent of £40; the valuation now being £23 10s. The County Court Judge came to the conclusion that the holding was within the Land Acts' definition of town-parks, but that it fell within the proviso contained in the last of the Acts; and he, therefore, decided that it was an ordinary farm, and he fixed the rent at £31. The case came on appeal to the Land Commission, and the Land Commission arrived at the conclusion that under the decision in *M'Namara v. M'Namara* (27 Ir. L. T. R. 2), and the rigid construction then put on the word "agricultural," that they were not at liberty to go into that question at all. Mr. Justice Bewley intimated with unmistakable clearness that, but for being coerced by the narrow construction that had been put on the word "agricultural," he would have held that this was an ordinary farm within the meaning in the proviso of the Act of 1887. Hence the Land Commission reversed the order of the County Court Judge. Notice of appeal was served, and shortly after that decision the Land Act of 1896 was passed; and Mr. Teeling now argued with great clearness that the case had come under section 6 of the Act of this year, intended to get rid of the narrow construction of the word "agricultural." He also contended that section 50 of the Act of 1896 applies to "pending proceedings," and that, inasmuch as the notice of appeal was served before the Act of 1896 passed, the case must be regarded as a "pending proceeding." It has been argued here on behalf of the landlord by Mr. Fetherstonhaugh that the letting was not agricultural, having regard to the occupations pursued by the different parties who had rented the lands from time to time, and the position of the holding with reference to the town of Navan. Mr.

Fetherstonhaugh does not challenge Mr. Teeling's contention that this is a "pending proceeding." Mr. Hamilton is, however, quite within his rights on behalf of the head landlord, Earl Russell, in arguing that the case is not pending. We cannot see our way to question the view on that point pressed upon us by Mr. Teeling, and not challenged by Mr. Fetherstonhaugh, and hence we must regard this as a pending proceeding. Having regard to the evidence in the case as to the user of this holding, we must reverse the order of the Land Commission ; but, considering what was the state of the law when that decision was pronounced, and the circumstances under which we feel bound to reverse that decision, we do not think it is a case in which we can say anything about costs.

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FITZGIBBON, L.J.—I concur. The section on which this retrospective legislation arises is in these words. [Reads section.] Now, the dates make it plain that the decision in this case was being appealed from at the time of the passing of this Act, for the notice was served before the Act was passed, and had not been heard when the Act became law ; so that the appeal comes within section 50. With regard to the case itself, the only clause we have to deal with at present is section 6. When the former construction put on the word "agricultural" in *M'Namara v. M'Namara* is spoken of as narrow or rigid, it must not be forgotten that that construction was put upon it, not by the Judges, but by the statute itself. In the language of the statute the word "agricultural" was opposed to "pastoral," and, therefore, did not include it ; but section 6 of the Act of this year says that in future the word "agricultural" is to include "pastoral," and the result is that that word, like so many other words in these Land Acts, is to have a meaning which is not its natural one. Is it possible to give a merely prospective effect to this Act? In the construction of section 9 the word "agricultural" is to

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be construed agricultural or pastoral. But construed by whom? By the Court before which the proceeding is pending; and as this appeal was "pending," the only possible construction which would do Mr. Hamilton any good would be one that would make a particular word have a particular meaning in the Inferior Court, and a different meaning in the Superior Court. Such a construction appears repugnant to the ordinary rules relating to Acts of Parliament. If an Act declares that in a prior Act some word shall have a particular meaning, it must have that meaning in the original Act where it first occurred. Even if the Act of 1896 had not passed at all, Mr. Teeling would have had a good case to argue that this place was used as an ordinary agricultural farm. There is some evidence about meadowing and top-dressing; and if Mr. Teeling had succeeded on that ground, the order then to have been made by us would have been identical in substance with that which we now make—namely, an order declaring that, in the opinion of this Court, the holding was one to which the Act of 1887 applied; and then we, having no jurisdiction to fix rents, would have remitted the case to the Land Commission to proceed as to justice might appertain. Now, if that order had been made, and if the Act of 1896 had passed in the meantime, would there then have been a "proceeding pending" in the Land Commission? If so, section 6 would apply, and in the subsequent stages of the proceeding the Land Commission would have been obliged to give the meaning to the word that the section has enacted. If the case was sent back, say, before the 14th August last, with an order to proceed as to justice might appertain, it would be then proceeding before the Land Commission; and, speaking for myself, I do not see how the same argument is not now applicable to us. As to Mr. Fetherstonhaugh, it seems to me that he has failed to show that this place was used as anything but an agri-

cultural or pastoral farm. Hence we discharge the order of the Land Commission, and declare that, in our opinion, the Act of 1896 applies, and we remit the case to have a fair rent fixed.

BARRY, L.J., concurred.

WALKER, L.J.—I shall not say anything as to the merits of this case; it appears clear. With regard to the words “pending proceeding,” let us suppose that both the other Courts had decided against the tenant, and that we, on appeal, reversed that decision, would the appeal not have been a pending proceeding by reason of our remitting it to the Court below? Such a conclusion would appear to be absurd.

Appeal.
November 17,
1896.

Rogers
v.
Murphy.

Walker, L.J.

LAND COMMISSION.

(Before BEWLEY, J., FITZGERALD, Q.C., and LYNCH,
Commissioners.)

Ryan v. Cooper.

The facts appear in the Judgment.

BEWLEY, J.—In this case a question was raised on behalf of the landlord, that the tenancy was one that was excluded from the provisions of the Land Law Acts. The holding contained about 18 statute acres, and it was situate close to the town of Cashel. It was held under a tenancy from year to year, at a yearly rent of £43 16s. The holding for a great number of years had been undoubtedly used mainly as grass, either for pasturage, properly so called, or for dairying purposes; and on behalf of the landlord it had been contended that the holding was let to be used mainly or wholly for the purposes of pasture; that the tenant did not

Land Com.
November 20,
1896.

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1896.

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v.
Cooper.

Bewley, J.

actually reside on the holding, nor in any adjoining holding ordinarily used with the holding now before the Court. The onus of establishing this contention lay, of course, on the landlord. The origin of the tenancy was lost in obscurity. The first tenant of whom they heard was Captain Minchin, and that gentleman died some years ago, at a very advanced age, after he had been in occupation for a considerable number of years. The original tenancy must date, at least, half a century back. It was a tenancy created apparently by parole agreement; there was no trace of a document in the case, and the purpose of the letting must be sought for outside the contract of letting. The principle which the Court adopted in dealing with these cases was settled by the House of Lords so far back as the case of *Westropp v. Elligott*, decided shortly after the passing of the Land Act of 1881. Having quoted from the Judgment of Lord Watson in the House of Lords in that case, his Lordship continued to say that the question for them to consider was whether at the time of the original letting in this case there was a purpose to let the holding wholly or mainly for the purpose of pasture. There was nothing, either in relation to the character or capability of the holding, to lead the Court to infer that the tenant at the remote period at which the tenancy commenced could not have reasonably contemplated another use for it. The holding was situate close to the town of Cashel, manure could be had with ease there, and the holding might have been used for the raising of potatoes or vegetables or any other tillage, so far as they could see; and under these circumstances the landlord had failed to establish his objection to the fixing of a fair rent. The old rent was £43 10s., the judicial rent £28, and they now fixed the judicial rent at £30 10s.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before WALKER, C., SIR PETER O'BRIEN, C.J.,
FITZGIBBON and BARRY, L.JJ.)

Stevenson v. Parker.

Land Law Act—Covenant against alienation—Statutory prohibition—7 Geo. IV., c. 29 (Ir.).

Appeal.
Nov. 2, 5, 6,
1894.

By lease dated the 2nd April, 1827, the lands of Kilgreel, in the County of Antrim, containing 60 acres, 2 roods, 6 perches, were demised to B. for three lives, or thirty-one years, and the lease contained a covenant against alienation without the consent in writing of the lessor. By an agreement in writing, dated the 19th December, 1856, S. (in whom the interest of B. was vested) agreed to grant to M.P., the elder, portion of the said lands, comprising 10 acres, for seven years, from the 1st November, 1856, at the rent of £30. M.P., the elder, continued in possession down to the date of his death, which happened in 1877, and after his death M.P., his eldest son, remained in possession, paying the rent and receiving the receipts in his own name. There was no evidence given by either landlord or tenant as to whether the head landlord had consented in writing, or at all, to the sub-letting to M.P., the elder, or that the sub-letting ever came to his knowledge. On the 30th April, 1892, M.P. served a notice to fix a fair rent upon S., which was dismissed by a Sub-Commission (Bailey, A.L.C.). On appeal the Land Commission, being of opinion that it was competent for them to presume that a deed had been executed releasing the covenant, reversed this decision. On a case stated for the Court of Appeal:—

Held (reversing the decision of the Land Commission) (1) that it was not competent to presume that a deed had been executed releasing the covenant; and (2) such a release would not affect the prohibitive clause in the statute 7 Geo. IV., c. 29.—*Ir. Rep.*, 1895, vol. ii., 504.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before PALLES, C.B., & FITZGIBBON & BARRY, L.JJ.)

Moore v. Batt.Appeal.
June 8,
1891.

Lands demised by lease of 24th of June, 1840, as "the Mansion-house, Offices, and Demesne and Farm of Newgrove"—Held to have retained that character, notwithstanding the user of the holding for agricultural purposes.

The Sub-Commission (Greer, A.L.C.), on the 23rd July, 1889, dismissed the originating notice of the tenant. On the 13th March, 1891, the Land Commission—Bewley, J., and Fitzgerald, Q.C.—reversed the decision. The Court of Appeal affirmed the decision of the Sub-Commission, and allowed the appeal with costs.

Prior to the year 1824 the holding of Newgrove was the property of Daniel M'Neill, who was the owner in fee of these and neighbouring lands, forming the residue of the lands of Ballylessan, containing in all about 600 acres, statute measure. The present holding and other lands were sold for £23,000 by Captain M'Neill to Mr. Narcissus Batt, of Purdysburn, to whom they were conveyed by indenture dated 1st of July, 1824. Purdysburn was then, and still is, the seat of the Batt family, and is situate in the County of Down, less than two miles from Newgrove, and consists of a very handsome mansion-house and demesne. Newgrove House was not occupied at any time by any member of the Batt family, but was let, from time to time, with the offices, garden, and grounds, for short periods, to several persons in succession. By lease dated the 24th June, 1840, Robert Batt (the successor of Narcissus Batt) let to Francis

William Heath "the mansion-house, offices, demesne, and farm of Newgrove, containing 152 statute acres," for the lives of Her Majesty the Queen, the late Prince Consort, and the eldest child of Her Majesty, and for the lives and life of the survivors or survivor of them; and after the decease of the survivor, for so much of the term of sixty-two years commencing from the 1st November then last as should be then unexpired, at the rent of £325, with a clause of surrender every three years. The lease excepted timber out of the demise, and contained a covenant by the lessee to repair, paint, amend, and keep the mansion-house, offices, and out-offices, garden walls, and all other erections, buildings, and improvements then or thereafter to be made thereon, and the demesne lands and premises, with the appurtenances, with all reparations and amendments, and to surrender and yield up the mansion-house, offices, gardens, improvements, and demesne lands and premises well and sufficiently repaired at the end of the term. There was also a covenant by the lessee not to assign or demise except in one entire lot, and a proviso enabling the lessee to surrender portions of the demised premises, and to obtain an abatement of rent in case a new line of country road should be made to pass through any part of the demesne and lands of Newgrove, and should cut off part of the demesne lands from the part on which the mansion-house and offices of Newgrove stood; but the lease did not contain any covenants restrictive of the mode of cultivating or using the lands. The lessee's interest in the lease was assigned to Archibald Moore, by deed in 1885, for £1,060. The estates of the Batt family in the County of Down are of considerable extent and worth several thousands a-year.

The land had been used as an agricultural farm by Moore, the tenant, and it was not surrounded by a wall.

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June 8,
1891.

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Batt.

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1891.

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It was proved that at one time there were ditches through the farm, and when Heath got the place, there were fences through it like an ordinary farm. There was not any gate-lodge in Captain M'Neill's time ; but in 1841 a gate-lodge was built by Heath, who worked the land as an ordinary agricultural farm. Heath sold the land to Irwin, and the latter held it for nine years from 1872 ; he was in business in Belfast, and drove in and out every day, the lands being about six miles distant from the Royal Avenue. The house was an old family mansion, and consisted of a complete basement story and second story, and contained eight bedrooms. It was situated more than one mile from Purdysburn.

Palles, C. B.

PALLES, C.B.—We think it unnecessary to call for a reply, as we are all clearly of opinion that the lands in question are demesne lands. I adopt the words of Sir E. Sullivan in *Griffin v. Taylor*: (1) "The true definition of demesne lands is lands held by the owner, with the mansion-house." No doubt, every house is not a mansion-house, and it would be impossible in any words to strictly define what may be a mansion-house as distinguished from a farm-house. To determine this many circumstances may, and probably must, be taken into consideration ; but I shall not go into this question, as it was hardly contended that these lands were not demesne lands in the hands of M'Neill. The real contention upon the part of the tenant here, and that which I understand formed the ground of the decision of the Land Commission, was, that, although the lands were demesne lands in the hands of M'Neill, they ceased to be such in 1824, when they were sold to Batt ; and if not, at least in 1840, when they were leased to Heath.

The ground of the contention that they ceased to be demesne lands in 1824 was, that Batt was the owner of a larger demesne and of a handsome mansion-house at Purdysburn, that he never resided at Newgrove, and that he let the mansion-house, with the offices, gardens, and grounds, for several short periods in succession.

The second contention, that they ceased to be demesne lands in 1840, was attempted to be supported by the terms of the lease of the 24th June, 1840, by which they were demised for three lives and sixty-two years concurrent, with a clause of surrender at the end of every three years.

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Batt.

Palles, C. B.

Each of these contentions, as I understand it, is founded on this: that from the time of Batt's purchase in 1824, the person who occupied the lands was not a "tenant in chief," and that, therefore, the lands were excluded from the definition of demesne lands given by FitzGibbon, L.J., in *Griffin v. Taylor*. . . . When lands are, as they were here, demesne lands in the hands of an owner in fee, they cannot, in my opinion, cease to be lands of that character unless a clear affirmative intention on the part of their owner be shown that they shall be held or used in a manner which is inconsistent with their continuing to be demesne lands. Therefore, neither a sale of the fee of the demesne lands and mansion-house together, nor a settlement of them giving estates to several in succession, will *per se* have this effect, for there is nothing inconsistent with each successive owner continuing to hold the lands with the mansion-house. It seems to me to follow that neither can a lease of mansion-house and demesne lands together necessarily do so, because the tenant is to hold *both* the mansion-house and lands. Neither, in my opinion, are *temporary* lettings of the mansion-house, gardens, and other grounds, the owner continuing in possession of the demesne lands, sufficient to deprive the lands of their character of demesne. Were the mansion-house let for a lengthened period of time without the demesne lands, the question would be different, and one upon which it is unnecessary to enter here.

In the present case the lease of 1840 shows in the clearest way an intention that the lands should remain as demesne lands in the hands of the tenant to whom

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both mansion-house and demesne lands were demised. The subject of the demise is "the mansion-house, offices, demesne, and farm of Newgrove." There is a covenant not to assign or demise, except in one lot. The timber is excepted from the demise; and, above all, there is a provision that if a new line of road should be made which would pass through any part of the demesne, and cut off part of the demesne lands from the part on which the mansion-house and offices stood, the lessee should be at liberty to surrender the portion so cut off, and obtain an equivalent abatement in his rent. All this appears to me conclusive to show that the lands, which were demesne lands in the hands of M'Neill, and which came to Batt as such, continued in his possession as such, and were as such demised to Heath.

In my opinion the decision of the Land Commission should be reversed.

FitzGibbon,
L.J.

FITZGIBBON, L.J.—We must begin, in this and every other case of the same class, with the fact that the "demesne land" is included in a holding which, but for the character of the land, would be within the Land Acts. It must be agricultural or pastoral land let to a tenant who is entitled to have a fair rent fixed, and to become a statutory tenant, unless the land is "demesne land." In other words, we must assume that we are dealing with a tenant who is a *farmer*. It has been often said that no exhaustive definition can be framed, and that each case must turn on its own facts; but let us state some of the essential elements, and see whether they are present here. First, we must assume that the holding, but for the character of the land, would be within the Land Act. Secondly, to acquire the dignity of "demesne," the land should be fit for the occupation of some person in the position of a tenant *in capite*, not necessarily an owner in fee-simple, but at least an owner of a lasting estate in reversion, and one likely to

want, or at least indicating some idea of requiring, the land for occupation, with a principal residence on his estate. I would add that if demesne land can retain its character when severed from the mansion-house, *a fortiori*, it ought to retain it when let with the mansion-house, provided the idea of occupation at some future time by the landlord has not been abandoned. What, then, must we look for? Fitness to be used as "demesne land;" the existence of a residence worthy of being called a mansion-house; and some prospect, however dim and distant, that the mansion-house, having been once so occupied, will again be so. These are all leading elements; but in considering them no material circumstance should be disregarded. The character of the land, the size of the holding, the term for which it is let, the conditions of the letting, are all to be considered, to see whether the character of the land once occupied as demesne has been changed, or whether the landlord has intended to keep any control, or has looked forward to resumption. Here, I think, the evidence is most conclusive. The lease of 1840 simply teems with provisions indicating an intention to preserve the character of the land as demesne. The timber is excepted. There is a covenant to repair, paint, amend, and keep the mansion-house, offices, garden, walls, etc., and to yield up the mansion-house, offices, gardens, improvements, and demesne lands in repair at the end of the term. There is a proviso enabling the lessee to surrender a portion of the demised premises, and to obtain an abatement of rent in case a new line of country road should be made through any part of the demesne and lands of Newgrove, and should sever part of the demesne lands from the mansion-house. I can only say that I think this holding consists of demesne.

BARRY, L.J.—These superlative words which have been made use of by FitzGibbon, L.J., exactly express

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L.J.

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my views on this case. We have had hard cases on the subject of demesne land, and easy cases; and, in my opinion, the present case is in every respect a strong one in favour of demesne I wish it to be distinctly understood that I am deciding the case of *Moore v. Batt*, and no other.—L. R. Ir., xxxii., 68.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., FITZGIBBON & BARRY,
L.JJ.)

M'Craith v. Burgess.

Land Law (Ireland) Acts, 1881 and 1887—Part of holding Demesne—Whole holding excluded as Demesne land.

Appeal.
May 2 & 3,
1892.

The Sub-Commission dismissed the originating notice. The Land Commission confirmed the decision, and the Court of Appeal affirmed the decision of the Land Commission on the grounds that as part of the holding, consisting of 52 acres, Irish plantation measure, of Lismortagh, had been let as demesne lands, and described in the documents as demesne lands, and that as the subject-matter—the house, garden, grounds, &c.—corresponded with the description, that part of the holding was demesne, and that, therefore, the whole holding was excluded from the Land Acts by virtue of section 58 (2) of the Act of 1881.—I.L.T., xxvi., 113.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before WALKER, C., FITZGIBBON and BARRY, L.JJ.)

Spencer v. Tedcastle.

Redemption of Rent—Fee-farm grant—Application by grantee to redeem his rent—Undemesning demesne lands—Land Law (Ireland) Act, 1881, section 58—Redemption of Rent (Ireland) Act, 1891.

A lessee in fee-farm of demesne lands sought to redeem the rent under the provisions of the Redemption of Rent Act, 1891, on the ground that the lands had been undemesned. *Held*, that the mere fact of demesne lands being held under a fee-farm grant, or under a lease for so long a period as to negative any intention of resumption at some future time by the head landlord, does not undemesne the said lands.

Appeal.
November 25,
1892.

Appeal from a refusal of the Land Commission to grant Mrs. Spencer an order to set aside an application by the grantee to redeem the rent due out of the lands of Ballykelly, on the ground that they were demesne lands. The holding contained 440 acres, rented at £259. The original demise in 1800 was a lease for lives renewable for ever, in which the holding was described as the "lands or demesne of Ballyneague." The same description was found in the renewals; and in a fee-farm grant made in 1876 the house and "demesne lands" were conveyed. In 1881 the Land Judges conveyed the estate to James Spring for ever, including "parts of the lands or demesne of Ballyneague."

WALKER, C.—This holding is described in all the instruments of title as demesne land. Under the Land Law (Ireland) Act, 1881, demesne lands held by tenants

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from year to year were excluded from the benefits of the Act, and lessees of demesne lands are excluded from the Land Law (Ireland) Act, 1887. The Redemption of Rent Act, 1891, allows a tenant who is in *bond fide* occupation of a holding to which Part I. of the Land Act of 1881 applies, to redeem his rent. It deals with a tenant who has a tenure longer than those who are allowed the benefits of the Acts of 1881 and 1887. Tenants of demesne lands are excepted from the operation of the Land Act, 1881, by the 58th section. If the tenants on this holding applied to have a fair rent fixed, they would have their originating notices dismissed as holding demesne lands. The case of *Magner v. Hawkes* (unreported) goes the whole length here, and puts a construction on the 5th section of the Land Law (Ireland) Act, 1881, inconsistent with the argument here of counsel for the grantee—that demesne lands must be lands demised by a landlord with an intention of resuming them at some future time. In that case this Court held that, although the owner in fee had let demesne lands as ordinary agricultural lands, yet the lands by subsequent user could acquire the character of demesne as between the lessee and the under-tenants. We are of opinion that the lands in this case are demesne lands, and the mere fact of demesne lands being granted by fee-farm grant, or demised by lease for a very long time, so long as to negative any intention of resumption at some future time by the landlord, is sufficient to deprive them of their character of demesne lands.

FITZGIBBON and BARRY, L.JJ., concurred.—I.L.T.R., xxvii., 4.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before WALKER, C., PORTER, M.R., FITZGIBBON and
BARRY, L.JJ.)

Watson v. Duke of Abercorn.

Land Law (Ir.) Act, 1881—Non-agricultural—Demesne.

The Sub-Commission (Greer, A. L. C.) dismissed the application, on the ground that the holding formed part of the demesne of His Grace the Duke of Abercorn. The Land Commission reversed that decision. The landlord appealed, and the Court of Appeal allowed the appeal, confirming the decision of the Sub-Commission, with costs. The tenant held a portion of the lands of the townland of Clunty, and a portion of the townland of Leglands, containing in all 57 acres, at a rent of £22. He had been in possession of the Clunty portion since 1851, and of the Leglands portion since 1875. He had served an originating notice to fix a fair rent, and the case came before the Sub-Commissioners, who, after hearing the evidence and visiting the lands, held that the holding was demesne, and dismissed the originating notice. From this decision the tenant appealed, and the case was heard by the Land Commissioners at Omagh in May last. Mr. Justice Bewley, pronouncing the unanimous Judgment of the Court, reversed the decision of the Sub-Commission, being of opinion that the land was not demesne, and that the tenant was entitled to have a fair rent fixed. From this the landlord brought the present appeal. The facts of the case were as follows:—In 1846 the late Duke of Abercorn, then Marquis of Abercorn, greatly extended the bounds of his demesne. For this

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April 26,
1894.

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Abercorn.

purpose he had bought lands adjoining it from the trustees of the Blessington estate. He also bought out the interest of the occupying tenants, compensating them either in money or by giving them farms elsewhere. Amongst other lands so dealt with the Duke took up the lands of Charles M'Crossan, of Clunty, planted the place with trees, retained it in his own possession for five years, and during that period spent £600 on it. He at the end of that period let to the present tenant at a rent of £35 a-year. From time to time the landlord, as he required it, took up successive portions of the lands of Clunty for the purpose of plantations. By the year 1875 half of the lands had been taken up in that way; and in that year, to compensate the tenant for the portions taken up, 19 acres of Leglands, which had been bought from the trustees of the Blessington estate, was thrown into the tenant's holding. The tenant had been in possession of the holding thus composed up to the present day.

Walker, L.C. WALKER, L.C., reversing the decision of the Land Commissioners, and dismissing the originating notice, said that the facts showed conclusively that the holding had been originally taken up by the landlord for the purpose of being thrown into his demesne; and the lands having once acquired the character of demesne, nothing had occurred subsequently to make it lose that character.

Porter, M.R. PORTER, M.R.—The landlord had these lands in his own possession for five years. He spent £600 in subsoiling and drainage. If there were nothing else in the case than that the landlord had occupied the place for four or five years, he would hold that this was irreconcilable with any other idea than that it was to be taken as part of the demesne. What followed only made the matter more clear. They found that this holding was now walled in as portion of the demesne, and not only so, but the landlord had dealt with it by

taking up from time to time just such portions and just at such times as suited him, for the purpose of planting it and using it as demesne. The reasons of the Chief Commissioners were not very fully or very specifically given. The statement of the facts of the case and the Judgment was very short indeed. The test in his (the Master of the Rolls') opinion was whether the lands were at any time demesne lands. If they were at any time demesne lands, in this case they undoubtedly had remained so. There was a passage in Mr. Justice Bewley's Judgment which he thought must have been inaccurately reported, for it said:—"On the whole, I think there is not sufficient evidence to show these lands can be properly treated as demesne lands, or that they were originally demesne lands." It had never been suggested that in order to make lands demesne lands it must be shown that they were originally demesne lands. At any rate, the reasons in the Judgment are not given more fully than appear in an examination of the evidence; and an examination of the evidence had led him to the conclusion that the decision of the Land Commission should be reversed.

FITZGIBBON, L.J., said in that decision they were supported by the unanimous opinion of the Sub-Commissioners who inspected the place, and who were affected, no doubt, by the physical conditions of the holding, which under recent decisions of that Court were even more important than they were originally thought to be. They had here a real mansion-house, a real demesne, and a real taking up of land for the purpose of extending the demesne. The subsequent dealings were most important. He could not conceive that either of the holdings could be held as free from that demesne land classification.

BARRY, L.J.—It appeared to him to be a very clear case indeed. It was not to be lost sight of that they were deciding it as the Sub-Commissioners who had

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FitzGibbon,
L.J.

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Barry, L.J.

visited the lands had decided it, it being a case in which an actual visual inspection of the lands must be of large value in enabling the Court to come to a conclusion as to whether the lands are demesne lands or not. In the course of the arguments the generous course adopted by the Abercorn family in their dealings with their tenantry had been pressed against them. In his (Lord Justice Barry's) opinion, the land was clearly demesne land.

LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C., and
O'BRIEN, Commissioners.)

Mansfield v. Congreve.

This appeal was brought from a decision of a Sub-Commission sitting in the absence of the Legal Assistant Commissioner. The appeal was on the grounds that—1st, the holding was demesne land; or, 2nd, that it was a pasture holding; or, 3rd, a residential holding; or, 4th, that the rent should be increased.

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1894.

The documentary evidence in support of the demesne case was that in certain deeds before 1827 the holding was described as the "Demesne of Landscape," and in other deeds since that date it was not so described. The estate map, made in 1822, called it the "Demesne of Landscape." It had a residence upon it; it was prettily situated in the valley of the Suir.

The facts appear in the Judgment.

BEWLEY, J.—This case comes before us on a rehearing of an order made by a Sub-Commission, which

unfortunately was not presided over by any Legal Assistant Commissioner; and as it was a case of some difficulty and complication, depending to a large extent on the effect of deeds and other instruments, it was to be regretted that the two Lay Sub-Commissioners took upon themselves the decision of the case without con-

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CORRECTION.

Mansfield v. Congreve.

On the 24th July, 1894, the Supreme Court of Appeal reversed the decision of the Land Commission, and held with Mr. Commissioner O'Brien, that there was evidence of the lands having been undemesned—FitzGibbon, L.J., stating that the onus of proving them to be demesne lands *primâ facie* rested on the landlord. He said there was preponderating evidence that the character of demesne land had ceased; at least there was no evidence that the land was taken as demesne in 1847, or had ever been demesne since. Order of Sub-Commission affirmed.

demesne character. They then came to the last instrument of letting of April 24, 1857, by which the lands were let by John Congreve, Esq., of Mountcongreve, to Edward Mansfield, of Monadeer, County Waterford, Esq. Mr. Mansfield was a man of landed property, not an ordinary farmer in any sense. So the history of the

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holding since the end of the last century showed that the lands at any rate were of that character that they never had been in the hands of a man who in ordinary language would be called a farmer. They had also the description of the lands, that they were principally in grass, studded over with ornamental trees; and the whole question which they really had to consider was whether the effect of this last letting in 1857 was to deprive lands which were originally a demesne of the demesne character. This was a letting merely for twenty-one years, made to a person in the position of an independent gentleman. At the expiration of the twenty-one years Mr. Mansfield held on. He (Judge Bewley) and Mr. Fitzgerald were of opinion that the lands were originally demesne lands in 1792, and that nothing had occurred since sufficient to deprive them of their demesne character. Under these circumstances, the order of the Sub-Commission must be discharged, and the originating notice dismissed.

Mr. Commissioner O'Brien in the following Judgment dissented.

O'Brien, Cr.

O'BRIEN, Cr.—This appeal is brought on the grounds that—1st, the holding is demesne land; or, 2nd, a pasture holding; or, 3rd, a residential holding; or, 4th, that the rent should be increased. The documentary evidence in support of the demesne case is, that in certain deeds before 1827 the holding was described as the "Demesne of Landscape," and in other deeds since that date it was not so described. The estate map, made in 1822, called it the "Demesne of Landscape." It had a residence upon it; it was prettily situated in the valley of the Suir; there was some good hedgerow timber on the land, and it was such a place as would be popularly known as the demesne of the resident tenant, and would, no doubt, be so described by an auctioneer. But this holding was never occupied or used by the landlord in connection with his own residence and

demesne proper, which was several miles distant from this holding. It has been continuously let without any intention shown by the landlord to resume possession for his own use. In 1801 it was let on lease for £150; in 1827 it was let for three lives at £132; and again in 1857 on a twenty-one-year lease to the present tenant, who remained in occupation as a yearly tenant till now. The lease of 1857 is an ordinary farm lease, containing no restrictions on the use of the land to pasture only; nor has the use of the land been confined to pasture. Parts have been continually in tillage: as much as 8 Irish acres sometimes—exclusively of artificial meadow, which properly was tillage—has been under tillage at one time. Captain Dawson said some of the land was too good to till; but that is merely another way of saying that the price of agricultural produce is so low that tillage is now unprofitable. There was much land too poor to till for the same reason; but that would not constitute such land “pasture” to be excluded from the Land Law. The evidence in proof of the holding being “demesne,” or residential, appears to me to be absurd: a holly hedge, some shrubs planted by the tenant, calling the roadway to the house an “avenue,” resting this avenue argument on an iron gate, put up by the tenant to replace an old wooden gate tied up with ropes, which he found when he took the farm, are no proofs that the place was let otherwise than as a farm. In spite of the artistic photographs produced, the residence was admittedly a small, inconvenient six-roomed house, and was unfit for habitation when Mr. Mansfield took the place. Everything which had been done to make the house habitable, and the holding neat or ornamental, had been done by the tenant. The house and offices were in thorough disrepair when Mr. Mansfield came into occupation. He re-slatted the house, repaired and enlarged the offices, and, of course, had to maintain the buildings. Taking his outlay and the cost of main-

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- Land Com. tenance into account, he thought Mr. Peate's estimate
 May, of the fair rent of the buildings, viz., £10, should be
 1894. adopted. He took it from the value put upon the land
 by Assistant Commissioner M'Kenzie, that his descrip-
Mansfield tion of it, as third-class pasture, was a clerical error.
 v. His estimate of £68 differed very little from Mr. Peate's
Congreve. estimate of £69, or Captain Dawson's of £71. In con-
 O'Brien, Cr. clusion, he thought the judicial rent should be fixed at
 £80.

LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
 Commissioner.)

**Gun-Cunningham, landlord ; Patrick Byrne,
 tenant.**

*A, who held lands under a lease for lives renewable for
 ever, made in 1855, and converted into a fee-farm
 grant in 1884, served an originating notice under the
 Redemption of Rent (Ir.) Act, 1891, to redeem his
 rent.*

*Held, that A was entitled to apply to have his rent
 redeemed.*

*Application by the landlord to set aside an originating
 notice by the tenant under the Redemption of Rent (Ir.)
 Act, 1891.*

1892. BEWLEY, J.—The originating notice in this case was
 served by the tenant under the provisions of the Re-
 demption of Rent (Ireland) Act, 1891, and in it the
 holding was stated to be held under a lease, dated the
 12th July, 1855, made by James E. R. Gun-Cunningham,
 and Robert G. A. H. Gun-Cunningham, of the first part ;
 the said Robert G. A. H. Gun-Cunningham, of the

second part ; and Patrick Byrne, of the third part, for three lives, at the yearly rent of £314 7s. 4d., the lease being renewable for ever on the payment of a peppercorn on the fall of every life.

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This statement was in fact erroneous, as the leasehold interest had been converted into a tenure in fee-farm under the provisions of the Renewable Leasehold Conversion Act, and the holding was held under a fee-farm grant, dated the 10th December, 1884, executed by the present landlord to the present tenant.

The case came before us on an application by the landlord to set aside the originating notice on the grounds (1) that the tenant does not hold under the lease stated in his notice, but under this fee-farm grant ; and (2) that the tenant is not a lessee or grantee within the meaning of section 1 of the Redemption of Rent (Ireland) Act, 1891 ; and (3), further, that, having regard to the rent payable in respect of the holding, the Land Commission has no jurisdiction to effect the redemption of the rent reserved by the fee-farm grant, or to fix a rent in respect of the holding. The first of these objections—the misdescription of the instrument under which the tenant holds—is not a matter of any serious consequence ; and on the hearing of the application we gave leave to the tenant to amend the originating notice by setting out the fee-farm grant instead of the lease.

The second and third grounds of objection, however, raise questions of some importance. It is submitted on behalf of the landlord that the tenant is not entitled to apply under the Redemption of Rent (Ireland) Act, 1891, inasmuch as the fee-farm grant under which he holds did not exist at the time of the passing of the Land Law (Ireland) Act, 1881. Section 1 of the Redemption of Rent (Ireland) Act, 1891, provides that where a person in *bond fide* occupation of a holding to which Part I. of the Land Law (Ireland) Act, 1881, applies, is a lessee under a lease to which the provisions

Land Com. 1892. of section 1 or section 3 of the Land Law (Ireland) Act, 1887, do not apply by reason of its being renewable or perpetual, or is a grantee under a fee-farm grant; and such person holds his land at a rent which the Land Commission considers, having regard to the renewal fines (if any), and all the circumstances of the case, holding, and district, to be a full agricultural rent, he shall, subject as thereafter mentioned, be entitled to apply, in the prescribed manner, to redeem his rent.

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Section 1 of the Land Act of 1887 applies only to lessees whose leases existed at the time the Act of 1881 came into operation; and, no doubt, a lessee applying under this section of the Redemption of Rent Act, 1891, must hold under a lease existing at the passing of the Act of 1881; but the section in terms imposes no such condition on a grantee under a fee-farm grant, and the tenant, therefore, in the present case, comes within the strict language of the statute. It is possibly difficult to suggest why a grantee under a fee-farm grant should be put in a different position in this respect from a lessee; but is there sufficient in the statute itself to cut down and control the general language used in reference to a grantee under a fee-farm grant? If the spirit of the enactment is appealed to as against the letter, it may be replied that, at the time of the passing of the Act of 1881, the tenant in the present case held under a lease, and, if the fee-farm grant had not been executed, would now undoubtedly be in a position to make his present application. If it is difficult to understand why a grantee under a fee-farm grant should be in a different position from a lessee with respect to applications under the Redemption of Rent Act, it is as difficult to conjecture why a lessee under a lease for lives renewable for ever, fully qualified to make such an application, should lose the right to apply by taking out a fee-farm grant. The original lease is still in substance the contract of tenancy between the parties: the execution of a fee-farm grant

under the provisions of the Renewable Leasehold Conversions Act, though it alters the tenure and the quality of the estate of the tenant, cannot be said to constitute a new and independent contract of tenancy. Therefore, whether the section receives a strict or a liberal construction, *quacunq̃ue viū* the tenant, so far as the qualification of tenure is concerned, is entitled to make the application under the Act.—L.R.I., xxx. 384.

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LAND COMMISSION.

(Before BEWLEY, J., and WRENCH and LYNCH,
Commissioners.)

Hamilton v. Casey.

Redemption of Rent (Ir.) Act, 1891 (54 & 55 Vict., c. 57, s. 1)—“*Fee-farm grant*”—*Meaning of—Church Temporalities Acts* (3 & 4 Wm. IV., c. 37; 4 & 5 Wm. IV., c. 90; 6 & 7 Wm. IV., c. 99)—*Sub-perpetuity grant*.

Appeal from the decision of Mr. Commissioner M'Carthy, directing the redemption of a perpetual yearly rent of £161 16s. 2d., created by a sub-perpetuity grant of June 1st, 1842.

February 11,
March 13,
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Held, a sub-perpetuity grant, made under the Church Temporalities Acts, is a fee-farm grant within the meaning of the Redemption of Rent (Ir.) Act, 1891.

BEWLEY, J.—In my opinion, the conveyance of the 1st June, 1842, is a fee-farm grant within the meaning of the 1st section of the Redemption of Rent Act; and the rent reserved by it is a fee-farm rent, and not a mere rent-charge. The grantor must pay the costs of the appeal.—*Irish Reports, 1894, vol. ii., 224.*

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LAND COMMISSION.

(Before BEWLEY, J., FITZGERALD, Q.C., and O'BRIEN,
Commissioners.)

Kieran v. Mollan.

*Fixing fair rent.—Fine paid by lessee for Fee-farm Grant.
—Improvements by Grantee, Landlord and Tenant
(Ireland) Act, 1870, s. 70; Land Law (Ireland) Act,
1881, s. 8, s.-ss. 1, 9, and 10; Land Law (Ireland)
Act, 1887, s. 1; Redemption of Rent (Ireland) Act,
1891.*

The payment of a fine by a lessee on obtaining a Fee-farm Grant, where the fine is paid for security of tenure or reduction of rent, is not to be taken as a ground for reducing the rent of his holding when a fair rent is fixed under the Redemption of Rent (Ireland) Act, 1891.

A Fee-farm grantee does not come within the definition of tenant in section 70 of the Landlord and Tenant (Ireland) Act, 1870, and is, therefore, not entitled to be exempted from rent in respect of any of his improvements.

Per BEWLEY, J.—A fine paid to the landlord by an incoming tenant of a holding subject to the Ulster custom in respect of tenant-right, or one paid for the purpose of acquiring improvements made by a previous tenant or by the landlord, are payments which must be taken into consideration in fixing a judicial rent.

Two questions of law of considerable importance and some difficulty arise in the present case. The proceedings were instituted by the grantee under the Redemption of Rent (Ireland) Act, 1891, for the purpose of redeeming the perpetual yearly rent of £100, created by an indenture of fee-farm grant dated the 1st October, 1875, or, in the event of the grantor not signifying his consent thereto in the prescribed manner and in the

prescribed time, then for the purpose of being deemed a tenant of a present tenancy, and having a fair rent fixed. The prescribed consent was not given; and, therefore, the case was sent down to a Sub-Commission, who, by an order dated the 11th May, 1893, fixed the fair rent of the holding at the yearly sum of £70. The holding contains about 100 statute acres, and various improvements of a substantial character in the way of buildings and drainage were executed on it by the grantee or his predecessors in title. Prior to the execution of the fee-farm grant the grantee was tenant of the holding for the unexpired residue of a term of sixty-one years, created by an indenture of lease dated the 12th February, 1851, at the yearly rent of £100; and the fee-farm grant was executed in consideration of the surrender of this lease, and the payment to the grantor of a fine of £50.

In estimating the fair rent, Mr. Bailey, the Legal Assistant Commissioner, was of opinion that an allowance should be made to the tenant in respect of this fine; and further, that the tenant was entitled to be exempted from rent in respect of *all* improvements made by him or his predecessors in title, consisting of the buildings and drainage works to which I have already referred. Acting on this view, the Sub-Commission allowed the tenant a sum of £12 per annum in respect of the drainage improvements, by way of deduction from what otherwise would, in their opinion, be the fair rent, and also exempted him from rent in respect of the buildings erected by him or his predecessors in title; and the questions for us to decide are:—(1) Whether the payment of the fine is to be taken as a ground for reducing the rent of the holding; and (2) whether the tenant is entitled to be exempted from rent in respect of all or any of the improvements.

In dealing with the first of these questions, it is important to consider, in the first instance, the provisions

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of section 8 of the Land Act of 1881. Sub-section 1 of that section enables the tenant of any present tenancy to which the Act applies to apply to the Court to fix a fair rent of his holding, which rent is to be determined by the Court, "having regard to the interest of the landlord and tenant respectively;" and sub-section 1 provides that "the amount of money or money's worth that may have been paid or given for the tenancy of any holding by the tenant or his predecessors in title, *otherwise than to the landlord* or his predecessors in title, shall not of itself, apart from other considerations, be deemed to be a ground for reducing or increasing the rent of such holding." This cannot be taken as a positive enactment that the amount of money paid to the landlord for the tenancy of any holding must, apart from other considerations, be deemed to be a ground for reducing the rent of such holding, but must be construed as a declaration that, under certain circumstances, the payment of a fine to a landlord may be an element in estimating what the fair rent of a holding should be. If a fine or "input" (as it is frequently called) has been paid to the landlord by the incoming tenant of a holding subject to the Ulster custom in respect of tenant-right, it must undoubtedly be taken into consideration, in my opinion, in fixing the fair rent of the holding; or if, as is sometimes the case, a fine has been paid for the purpose of acquiring the improvements made on the holding by a previous tenant or by the landlord, the payment is an element that cannot be disregarded in determining the judicial rent. But where, on the granting of a lease, a fine has been paid either for the purpose of obtaining the security of a term, or for the purpose of obtaining a letting at a reduced rent, or partly for one of these purposes and partly for the other, I fail to see how the payment can be deemed a ground for reducing the rent. Take the case of two tenants, A and B, holding two farms of the

same letting value on the same estate. The landlord prior to 1881 offers to give each of them a lease of his holding for thirty-one years at a yearly rent of £100, or in the alternative at a rent of £80 per annum, if a fine of £200 is paid. A elects to pay the fine of £200, and obtains a lease at a rent of £80 a-year; while B, being unable or unwilling to pay the fine, is given a lease for the same term at a yearly rent of £100. On the expiration of the leases, A and B avail themselves of the provisions of the 21st section of the Land Act of 1881, and apply to the Court to have fair rents fixed on their respective holdings. It is found that, owing to the general fall in prices of agricultural produce, the fair letting value of each holding is now £75. Is there any reason for making a deduction from this in A's case by reason of the fine paid on the granting of the lease? He has obtained all the advantages that he bargained for, and the very thing for which the fine was given, namely, the privilege of paying the reduced rent of £80 during the entire term; and there certainly appear to be no equitable grounds for holding that B, who perhaps has paid the full rent of £100 for many years after it became a rent considerably in excess of the letting value, should be placed in a worse position than A. The case where the fine has been paid merely for security of tenure appears to me to stand on the same footing. If a tenant from year to year, paying a rent of £100 per annum, pays a fine of £100 to obtain a lease for thirty-one years at the same rent, and enjoys the possession of the holding during the term, he has obtained the full consideration for which the fine was given, and does not appear to have any legitimate grounds to get back in any shape a portion of the fine, no more than he has to be recouped any part of an excessive rent that by his contract of tenancy he may for many years have been obliged to pay.

In the cases put I have assumed that the tenant

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waited until the expiration of his lease by effluxion of time, and then availed himself of the benefits of the 21st section of the Act of 1881. But if, instead of so acting, he applied during the currency of his lease to have a fair rent fixed under the combined provisions of the Land Acts of 1887 and 1881, I do not think he would be in any better or different position. Where a lessee takes advantage of the 1st section of the Land Act of 1887, he is "to be deemed to be a tenant of a present tenancy in like manner, and subject to like conditions, . . . as if his lease had expired." This section enables him to apply *in presenti*, instead of waiting for the expiration of his lease; but though he can thus anticipate future rights, he cannot enlarge these rights. (*Moylan v. Finch*, 25 I.L.T.R., 43, 28 L.R.I., 595; *Barton v. Atkinson*, 30 L.R.I., 396.) In the case of *Clements v. Tighe* (26 I.L.T.R., 100), where it appeared from the terms of a lease that the lessee was not entitled to any compensation for improvements on the expiration of his lease, which was for a term of thirty-five years, and the lessee applied to have a fair rent fixed when nine years only of his term had elapsed, it was held by this Court that he could not be exempted from rent in respect of buildings erected by him or his predecessors in title; and this decision was affirmed by the Court of Appeal. It appears clear to me, therefore, that if a lessee would not be entitled to claim any allowance in respect of a fine paid to the landlord in proceedings taken by him to have a fair rent fixed after the expiration of his lease, neither can he obtain such an allowance if the proceedings are taken during the continuance of his term. In the present case the application to fix a fair rent is made under the last clause of the 1st section of the Redemption of Rent (Ireland) Act, 1891, which provides that if the lessor or grantor does not consent to the redemption of the rent, the redemption shall not be made; but the lessee or

grantee, as the case may be, shall be deemed to have made the prescribed application under section 1 of the Act of 1887, and shall be held to be a tenant of a present tenancy, in manner and subject to the conditions and right of resumption mentioned in section 21 of the Act of 1881, as modified by section 1 of the Act of 1887: and his holding shall be subject to all the provisions of the said Acts with regard to present tenancies. This enactment, so far as the question of a fine is concerned, does not put a grantee of a fee-farm grant in a better position than a lessee applying to have a fair rent fixed under the Land Acts of 1887 and 1881. If the fine has been paid to secure a perpetual interest, the Redemption of Rent Act leaves the interest still an estate in fee-farm; but whatever may have been the purpose for which the fine has been paid, it is impossible, in my opinion, to deal with it on principles different from those applicable to the case of an ordinary leaseholder. For these reasons I am of opinion that the Sub-Commission acted erroneously in the present case in deducting an annual sum in respect of the fine from what they would otherwise have determined to be the fair rent of the holding.

The second question is one of great practical importance: "Is the grantee under a fee-farm, who has a fair rent fixed under the Redemption of Rent Act, entitled to be exempted from rent in respect of all or any of the improvements made by him or his predecessors in title?" The lessee of a holding not subject to the Ulster custom, who holds under a lease for a term certain of not less than thirty-one years, cannot claim to be exempted from rent in respect of any improvements other than permanent buildings and reclamation of waste land; and it is, therefore, startling if the grantee under a fee-farm grant has been placed by the Legislature in a much more favourable position in this respect, and is, as decided by the Sub-Commission in this case,

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entitled to be exempted from rent in respect of *all* improvements, no matter what their nature may be.

The 9th sub-section of section 8 of the Land Act of 1881 provides that "no rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessors in title, and for which, in the opinion of the Court, the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title." But this apparently general exemption was held by a large majority of the Court of Appeal in *Adams v. Dunseath* (Ir. L.T.R. 59 ; 10 L.R. Ir., 109) to be controlled by the 1st sub-section of the same section, which provides that the Court is to determine the fair rent, "having regard to the interest of the landlord and tenant respectively."

The effect of the decision in *Adams v. Dunseath*, as interpreted by the Land Commission in the fixing of fair rents during the last eleven years, is that a tenant seeking to have a fair rent fixed can only claim exemption from rent in respect for those improvements for which, if he were quitting his holding, he would be entitled to compensation under the Land Acts of 1870 and 1881. In *Adams v. Dunseath* (*ubi supra*) Sir Edward Sullivan, M.R., at page 138, expresses himself as follows:—"The 9th sub-section of section 8 of the Act of 1881, giving force to every word of it, can stand well together with the 8th section in all its parts. The mandatory duty cast thereby on the Commissioners is really one to be observed in administering the first part of the 8th section itself; and the meaning of it is this, that, though the Commissioners are to consider the interests of landlord and tenant respectively, there is one thing they must do, viz.:—not fix any rent that is an annual sum in respect of improvements made by the tenant or his predecessors in title not paid or otherwise compensated for by the landlord. These improvements are

the very improvements he would be compensated for if he was leaving his holding, and no other—a view which, independently of the right interpretation of the two statutes as a whole, is made further manifest by the introduction of the fourth sub-section therein enabling the Commissioners to disallow the application when the improvements have been maintained by the landlord or his predecessors in title.”

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Again, at page 141 the learned Judge states:—“This right of compensation is so clearly mixed up with the fixing of a fair rent that I am, by what I conceive to be the plain intendment of the statute, as shown by its language, compelled to hold that on its true construction the right to get compensation for improvements is really the basis of the 9th sub-section of the 8th clause in the Act of 1881.” And further on he says that the right of the tenant to get compensation for his improvements, and his right to be exempted from rent in respect of them, are, according to his view, almost, “if not entirely, correlative.”

Again, at page 142 he proceeds:—“If one reads the 9th sub-section *per se*, he would at first sight be disposed to give the word ‘improvements’ a very wide interpretation; but when we find in the very statute in which this word is used a peremptory direction that its meaning shall be taken as in the former Act of 1870, the rule is at once inferred that that interpretation must be abided by, the context not offering any obstacle. And when this is once determined, it seems to me to follow, as I have come to the conclusion, that the right to compensation is the true basis of the enactment in the 9th sub-section of section 8 of the Act of 1881; that the improvements mentioned in the sub-section must be taken as not merely defined in the Act of 1870, but also with the qualifications attached thereto by that statute, as far as the improvements were made before the passing of the Act of 1870.”

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The Judgment of the Chief Baron is to the same effect. (His Lordship read from page 158 : " If I be right," &c., to page 159, " of which he has a right to claim compensation.") Also, FitzGibbon, L.J., at page 180, states : " The statutes of 1870 and 1881 are not merely *in pari materia*; they are, under section 57 of the latter Act, ' to be construed together as one Act,' except when inconsistent. Wherever the fair rent is to be determined, the first duty imposed upon the Court is ' to have regard to the interest of the landlord and tenant respectively.' I cannot proceed to ascertain those interests while a tenancy continues upon any other principles than those which are to regulate them if a tenant quits his holding."

If we apply the principles laid down by the Judges in *Adams v. Dunseath* to the facts of the present case, it is to be observed that a grantee under a fee-farm grant does not come within the definition of a tenant in section 70 of the Landlord and Tenant (Ireland) Act, 1870, and is entirely outside the provisions of the Act giving a tenant the right to claim compensation for improvements. If the grantee under a fee-farm grant is evicted for non-payment of rent, or for a forfeiture in a breach of covenant, and possession of the holding is obtained by the grantor, all the improvements made by the grantee or his predecessors become the absolute property of the grantor, who is under no obligation to make any compensation to the grantee. It appears, therefore, to me to be the logical consequence of the decision in *Adams v. Dunseath* that the grantee under a fee-farm grant, who avails himself of the rent-fixing provisions of the Redemption of Rent Act, cannot be exempted from rent in respect of any improvements made by him or his predecessors in title. It is to be regretted, I think, that a grantee under a fee-farm grant has not been placed by the legislature in respect of improvements on the same footing as a long leaseholder ; but I do not find that

upon any legitimate construction of the statutes I can hold that he is entitled to be exempted from rent in respect of permanent buildings and reclamation of waste land.

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Under these circumstances Mr. FitzGerald and I are of opinion that the deductions made by the Sub-Commission, to which I have already referred, must be disallowed, and a rent fixed on the land and buildings as they now stand. The old rent was £100; the judicial rent, £70; and we now fix it at £88.

O'BRIEN, Commissioner (dissenting).—The questions raised in these two cases (4) are, whether the grantees applying to have fair rents fixed are entitled to credit for fines paid to the landlord, and to exemption of their improvements from rent.

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The fines of £450 by Kieran, and £700 by Doherty, were paid under the following circumstances:—

In 1875 or 1876 they surrendered leases with terms of about thirty years unexpired, and obtained fee-farm grants at their old rents. There was nothing very unusual in this; in 1876 the universal experience was that land had been continuously increasing in value; many persons at that time surrendered leases, and not only paid fines, but increased rents, to get fee-farm grants, for which, at the time, there was a perfect rage.

These tenants, with mistaken foresight, wished to secure themselves and their successors against future increases of rent; and, on obtaining the grants, appear to have made many and expensive improvements. Since 1875 agricultural land has immensely diminished in value, and the Redemption of Rent Act was passed to give relief to grantees holding at what had become excessive rents.

On receipt of originating notices under the Redemption of Rent Act, the landlord elected to let the cases go under the fair rent provisions of the law, instead of consenting to redemptions, though in the latter event

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the tenant's improvements might have been deemed to have increased the landlord's security for rent.

To my mind the necessary inference from the words "otherwise than to the landlord," in section 8, sub-section 10, of the Land Law Act, is, that payment of a fine to the landlord *may* be taken into account in fixing the rent. I am confirmed in this opinion by the decision of Judge O'Hagan in the case of *O'Neill v. Cooper* (1), in which the other two Commissioners concurred.

If land had risen as much as it has fallen in value, it might be argued that the fines paid in 1875 showed the rent to be low then, and consequently still lower now; and that the landlord was, therefore, entitled to an increase of rent. Unfortunately for both landlords and tenants, land has fallen very much in value; and the fines, if taken into account, can only be so by way of reduction. I think the principle adopted by the Sub-Commission, as explained by Mr. Bailey in his Judgment, is right, viz., to treat the grantees as part owners to the extent of their fines, and to apply the fall in value to the tenants', as well as to the landlord's, interest. This resulted, at the Sub-Commission rent, in allowing the tenant two and a half per cent. interest on his fine.

With respect to improvements, the contention that the landlord is entitled to rent, not only on the land, but on the buildings and improvements made by the grantees, amounts to a claim for the rack-rent of the farms as the fair rent. This would be an absurd result, and would reduce the fair rent provisions of the Redemption of Rent Act to a nullity. The circumstances in which the Act was passed, and the evil it was meant to remedy, must be considered, and a construction which will give some effect to the law, rather than one which gives none, is indicated by both the letter and spirit of the Act. Grantees are to be held tenants of present tenancies, and as such are entitled to be exempted from rent on their improvements. It was

further contended that the buildings were in excess of the requirements of these holdings, and that, if the improvements generally are to be exempted, the landlord is entitled to rent on the excess value of the buildings.

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I cannot agree with this contention. If the buildings have added to the value of the holding, they are an improvement. If they are useless, and have not added to the value, there is nothing on which to assess rent. But the description given by witnesses of the buildings would not lead me to think they were excessive. The method of valuing the buildings adopted by some of the witnesses is, in my opinion, wrong. One valuer estimated the annual value of the buildings at 5 per cent. on their original cost. It is a matter of universal experience, and that not only in Ireland, that expenditure on farm-houses and offices is seldom remunerative. The valuer said that 5 per cent. *ought* to be obtained; the real question is whether it *is* obtained.

O'Brien, Com.

As a rule, farm buildings are let with, and could not be let without, land. When this is so, they cannot be valued separately; if they can be let separately, their value is not a percentage on their cost, but what experience shows they would actually let for, with a deduction for maintenance and repairs. Any other principle is unreal, artificial, and conjectural.

The only doubt I have is whether sufficient allowance has been made by the Sub-Commission for the large and costly improvements made by the tenant, and the condition particularly of Doherty's farm, which is clearly due to good cultivation and heavy manuring, on which no rent should be assessed. I think the Sub-Commission rent should stand confirmed.—I.L.T.R., xxvii., 129.

NOTE.—As to the grantee of a fee-farm grant being entitled to exemption from rent in respect of his improvements, see *Mairs v. Lecky*, *post*. Also, I.L.T.R., xxix., 42.

Appeal.
Nov. 5 & 6,
1894.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before WALKER, C., SIR PETER O'BRIEN, C.J., and
FITZGIBBON, L.J.)

Lanyon v. Clinton and Kernoghan.

*Landlord and tenant—Fair rent—Fine—Fee-farm grant
set aside—Land Law (Ireland) Act, 1887, section 2—
Land Law (Ireland) Act, 1881, section 8.*

The Land Commission had, under section 2 of the Land Law (Ireland) Act, 1887, set aside two fee-farm grants, on the ground that the acceptance thereof was procured by threat of eviction. The grantees had paid fines to the landlord in order to obtain the fee-farm grants. After the fee-farm grants had been set aside, the tenants served notices to fix fair rents of their holdings.

Held, that in fixing the fair rents of the holdings, it was competent for the Land Commission to have regard to the fines paid by the tenants for the fee-farm grants.

Appeal on a case stated by the Irish Land Commission for the consideration of the Court of Appeal.

The case was stated as follows:—"The above tenants' holdings had originally formed portion of the Mountcashel estate, of which Sir Charles Lanyon became the purchaser in the Landed Estates Court; and at that time nearly the whole of the Mountcashel estate was held by leases for years, which expired on the 1st November, 1875. Both these tenants were in occupation under such leases at the date of their expiration, and we refer to the said leases. Clinton's old rent under this lease was £9 13s. 6d., and Kernoghan's £10 16s. 10d. About the time that these leases expired Sir Charles Lanyon had his whole estate valued by three valuers, with a

view to having his rents revised : one of the valuers being a Mr. Raphael, who had been connected with the estate since a period anterior to Sir Charles Lanyon's purchase, Sir Charles determined to act on his valuation, which was the lowest, and accordingly, soon after the time that the old leases dropped, a circular (to a copy of which we refer) was sent to each of the tenants, informing him of the amount of Mr. Raphael's valuation, and that he could have a thirty-one years' lease containing similar provisions to those contained in the expired lease at that rent, or a fee-farm grant at that rent, on payment of a fine equal to eight years' purchase of the new rent. Such circulars were sent to the tenants in the present cases. On the 11th December, 1876, Mr. Lanyon, Sir Charles's eldest son, attended at the Adair Arms Hotel, Ballymena, to collect rents, and arrange with the various tenants the new contracts of tenancy. Mr. Hugh Orr, his solicitor, was with him ; each of these tenants came and offered his rent ; they came separately, and alone ; and Mr. Lanyon told them they could now have either a thirty-one years' lease, subject to similar conditions as those contained in their old leases, at the rents stated in Mr. Raphael's valuation, or fee-farm grants at that rent upon payment of eight years' rent as fine ; but that he could not have one different from the rest as tenant from year to year, and that he could not have one holding out and the others not ; and that a number of other tenants had already signed. Kernaghan stated that he objected, and said the rent was too dear, and he would rather have no lease. Clinton also objected to the rent and to taking a lease. Mr. Lanyon refused to take rent from either of them until he signed a proposal for a lease, and said if he did not do so, the land was the landlord's. He also explained to each of them that if he took a thirty-one years' lease, he could not sell ; but if he signed for a thirty-one years' lease, he could afterwards have a fee-

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farm grant instead, and then could do what he liked with the land. Ultimately each of them signed a proposal for a thirty-one years' lease, paid the year's rent due, and left, and had no further negotiations with Mr. Lanyon. The proposal in each case was the same, and we refer to a copy of the same. Each of these tenants subsequently intimated to Mr. Hugh Orr that he would take a fee-farm grant instead of a lease, and Kernoghan signed the following at the foot of his proposal:—"I consent to pay you eight years' rent, on condition of your giving me a fee-farm grant." The evidence was that each tenant took the grant instead of the lease voluntarily, after he had signed the proposal for the lease; that once he had signed a proposal for the lease he had no further dealings with Mr. Lanyon on the subject; and the change from the lease to the grant was made by the tenants themselves voluntarily. Fee-farm grants were ultimately executed, and fines amounting to eight years' rent paid; and we refer to the said fee-farm grants. The said fee-farm grants were afterwards set aside by the Land Commission, under the 2nd section of the Land Law (Ireland) Act, 1887; and on a case stated for the consideration and decision of Her Majesty's Court of Appeal in Ireland, it was held that, under the circumstances stated, it was competent for the Land Commission to declare these fee-farm grants to be void under the provisions of the section above-mentioned. Each of the said tenants then served an originating notice to have a fair rent fixed, and on the hearing thereof the question was raised in each case, whether in fixing such rents regard could be had to the fines paid by the tenants under the circumstances aforesaid. We were of opinion that it was competent for us to take the payment of the fine into account, as ground for reducing what otherwise would be the fair rent of the holding; but on the application of counsel for the landlord, we agreed to state this case for the consideration and

decision of Her Majesty's Court of Appeal in Ireland. The question for such consideration and decision is: "Whether as a matter of law it is competent for the Land Commission, in fixing the fair rent of each of these cases, to take into account, as a ground for reducing the rent, the said sums paid by the tenants by way of fine for procuring the execution to them of the said fee-farm grants."

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The details of the several documents referred to in the case stated are immaterial for the purposes of this report.

WALKER, C.—We have heard this case very fully argued, and we are of opinion that the decision of the Land Commission is right.

Walker, C.

We must take it that the fee-farm grants under which the tenants held have been rightly set aside. They were fee-farm grants in a very simple form, whereby the holdings which form the subject-matter of this case were granted to the tenants in consideration of the fee-farm rents thereby reserved, and of two several sums—in the nature of fines—calculated at eight years' rent in the case of each holding respectively. . . . I think the Court has power to take a fine into account under the language of sub-section 1, or, at all events, under that sub-section coupled with sub-section 10; and, in my opinion, the true construction of both sub-sections is this: Where money has been paid to the landlord for the tenancy of any holding, or for what (as here) has been, by virtue of the statutory powers of the Land Commission, transmuted into the tenancy of a holding, that money may be taken into account by the Court fixing the fair rent, but to what extent is left in the widest terms to the discretion of the tribunal.

FITZGIBBON, L.J.—I agree. I do not think that the fee-farm grants are to be entirely thrown out of consideration. They were the root of the present tenancies, and the fines which were paid for them seem to me to

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L.J.

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be among "the circumstances of the case" to which the Land Commission is directed to have regard.

Sir Peter O'Brien, C.J., concurred.—*Ir. Rep.*, 1895, vol. ii., 150.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

May 15,
1893.

(Before WALKER, C., FITZGIBBON and BARRY, L.JJ.)

Kelly v. Rattey.

Land Laws—Redemption of Rent (Ireland) Act, 1891, sec. 1—"Grantee under a Fee-farm grant."

The applicant for redemption was the holder of a deed, dated 9th February, 1896, in which the grantor granted to John Hubert Kelly, his heirs, executors, administrators, and assigns, part of the lands of Lalistown for ever, at the yearly rent of £320 sterling, with power reserved to the grantor to distrain for arrears of rent, and in default of sufficient distress to re-enter and occupy as of his former estate. There were covenants by the grantee to keep the premises in tenantable repair and order, and by the grantor for peaceful enjoyment.

Held (affirming Mr. Justice Bewley), that the relation of landlord and tenant did not exist in the case, and that, therefore, the case was not within the Redemption of Rent Act, 1891, or the Land Acts.

WALKER, C.—For the purpose of enabling an appeal to be brought in this case, Mr. Commissioner Fitzgerald, who differed in opinion from Mr. Justice Bewley, withdrew his Judgment. A deed, dated 9th February, 1846, is Mr. Kelly's document of title, and

by that deed Henry Magan, whose estate is represented by Mr. Rattey, demised unto John Hubert Kelly, whose interest devolved on the appellant, the lands of Lalis-town and Ushna Hill, to hold unto John Hubert Kelly, his heirs, executors, administrators, and assigns, from 1st November last past for ever from thence next ensuing, and fully to be complete and ended ; he, the said John Hubert Kelly, his executors, administrators, and assigns, yielding and paying therefor and thereout yearly and every year during the said term unto the said Mr. Henry Magan, his heirs, executors, administrators, and assigns, the yearly rent or sum of £320. There were covenants in the deed to pay the rent and maintain in repair. Mr. Kelly seeks to take advantage of the alternative in the deed, that if the grantor does not consent to the redemption, he shall be deemed to have made the prescribed application under section 1 of the Act of 1887, and be held a tenant of a present tenancy in manner and subject to the conditions and right of redemption mentioned in section 21 of the Act of 1881, as modified by section 1 of the Act of 1887 ; and that his holding be subject to the provisions of the said Acts in reference to present tenancies. It seems to me that the notion entertained by the framer of the Act of 1891 was this :—Given a fee-farm grant and a grantee, such person should be entitled to apply ; but what he has done, and what the legislature has enacted, is to add to the landlord and tenant class a class not reached by prior legislation, the class of lessees whose leases were not touched by the Act of 1887, lessees under leases renewable or perpetual, and parties under fee-farm grants. It is necessary that Mr. Kelly should show that he is a fee-farm grantee in *bond fide* occupation of a holding to which Part I. of the Act of 1881 applies, and that he holds at a rent that the Land Commission consider a full agricultural rent. If he satisfies those conditions, then he will be entitled to have his

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rent redeemed, and to have his fee-farm tenure transmuted into a present tenancy with statutory conditions annexed. The grant is not one that at common law creates the relation of landlord and tenant; nor is it a grant converting a perpetual lease into a fee-farm grant; it is not a grant in fee-farm made since 1850. It is evident that grants since the Act of 1860 would be within that Act, and, I think, also grants since the Renewable Leasehold Conversion Act. Special pains were taken with the Renewable Leasehold Conversion Act to put what is called therein "fee-farm rent under the Renewable Leasehold Conversion Act" on the footing of rent service. There are given in the 14th and 15th Vict., c. 20, rights and remedies to recover fee-farm rents, save ejectment, though it does not make the relation of grantor and grantee rest in contract of tenure by relation. The Acts of 1881, 1885, 1887, and 1891 are all to be read *in pari materia* for the purpose of the true construction of the statute. It is argued for the appellant that "person" was the word used, and not "tenant," and that "holding," even after incorporating the definitions in section 57 of the Act of 1881 to their full extent, was not applicable to a fee-farm grant or a perpetual lease; and that the Act of 1885 was incorporated, the definition of "tenant" therein being brought in aid. This point does not aid the tenant, because the definition is: "The word 'tenant' shall include a tenant under a fee-farm grant;" in which "tenant" plays a prominent part. No doubt, the word "person" only is used, but there cannot be a person in occupation of a holding to which section 1 of the Act of 1881 applies who is not a tenant holding land from a landlord under contract of tenancy: and though the contract of tenancy under which a fee-farm grantee would hold is one of longer duration than the contract mentioned in section 57, the cardinal relation of landlord and tenant must still exist, and a contract of tenancy creating and

governing that relation. Besides, the words "holds his lands at a full agricultural rent" have been lost sight of; and it is requisite to recollect that the contemplated transmuted subject of present tenancy is one essentially containing the relation of landlord and tenant, with rights incident to it, which this fee-farm grant had not. The relation of landlord and tenant is the basis of the series of enactments beginning in 1881, and going on to 1891; and, in my opinion, the latter Act studiously perceives that relation as known to and interpreted by the law. The Judgment of Mr. Justice Bewley was, in my opinion, right, and this appeal must be disallowed.

FitzGibbon and Barry, L.JJ., concurred.

Appeal.
May 15,
1893.

Kelly
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Ralley.

LAND COMMISSION.

(Before BEWLEY, J., FITZGERALD, Q.C., and O'BRIEN,
Commissioners.)

Kelly v. Campbell.

*Tenancy created by an agreement, dated 1st July, 1893—
Holding part of a larger holding held by another
tenant prior to that date. Held to be a future
tenancy—Boyd v. Tredennick considered.*

The facts appear in the Judgment.

BEWLEY, J.—In this case a question of future tenancy was raised. The tenant in this case undoubtedly held under an agreement, dated 1st July, 1893, whereby she agreed to become a future tenant of the present holding. It appeared that the present holding was part of a larger holding held prior to 1893 by a man of the name of

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1896.

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1896.

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Bewley, J.

John Griffin. An arrangement was then come to that this portion should be let direct by the landlord to Mary Kelly, and that a rent should be fixed accordingly by the landlord for it. The arrangement was embodied in an agreement of 1st July, 1893, by which she agreed to take the holding as a future tenancy. On the part of the tenant it was argued that this case came within the principle of *Boyd v. Tredennick*, decided by the Court (2 I. R., 1896, page 364). But the case was plainly distinguishable. There an existing tenancy was partitioned with the sanction of the landlord, and a portion of it sold as an existing tenancy to another person; and the Court held in that case that the existing tenancy was a present tenancy. In this case the intention of the parties was to put an end to the old tenancy so far as this part of the holding was concerned, and to create an entirely new tenancy. The terms of that tenancy were regulated by this agreement of the 1st July, 1893, and that undoubtedly in his (Judge Bewley's) opinion was a future tenancy. Therefore, the order of the Sub-Commission in this third case, fixing a rent, must be discharged, and the originating notice dismissed.

[Not reported.]

LAND COMMISSION.

(Before O'HAGAN, J., LITTON, Q.C., and VERNON,
Commissioners.)

Gamble v. Simpson.

Land Law (Ireland) Act, 1881, secs. 58, 21—Agricultural holding—Home farm.

Land Com.
1884.

This was an appeal from the decision of the Sub-Commissioners dismissing the application of the landlord to resume the holding on the expiration of a lease, for the purpose of occupying the same as a home farm.

The holding consisted of 23 acres, situate at Antrim. It appeared that the landlord demised the holding by lease for twenty-one years from 1st November, 1861, having been previously in occupation of the holding himself. On the expiration of the lease in 1882, the landlord brought an ejectment for overholding against the tenant, and the County Court Judge gave a decree. From that decree the tenant appealed, and the appeal came before the Chief Baron. The question then raised was whether the holding constituted a home farm, and, therefore, was exempt from the provisions of the Land Act of 1881. The Chief Baron stated a case for the Common Pleas Division, and the Judges decided that the holding was not a home farm, and that, therefore, the ejectment decree in the Court below should be reversed. The landlord thereupon brought an application, under the 21st section of the Act, to resume the holding as a home farm under that section. Greer, A.L.C., dismissed the application, and hence the appeal.

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1884.

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v.
Simpson.

O'HAGAN, J., said the Court felt no difficulty about this case. If it had been contended that this case had really been decided by the Common Pleas, formally and technically, they differed from that, and for this reason, that the decision of the Common Pleas was given on the 58th section, defining the exceptions to the Act, and merely amounted to this: that at the time when the decision was sought by Mr. Gamble it did not form part of a home farm, but part of an ordinary agricultural holding, and, therefore, came within the 21st section. And it was quite consistent with that state of things that a man might *bonâ fide* desire to make it a portion of a home farm. But they agreed that it had been really and formally and substantially decided by the Common Pleas. Before 1862 the entire 34 acres was used by Mr. Gamble as an ordinary agricultural farm. How did he propose to use it, supposing that he got it back? He proposed to incorporate it with the remaining 11 acres

O'Hagan, J.

Land Com. 1884. on which the house stood, and use the entire as an agricultural holding, just as it was used before. Therefore, if it was not a home farm, and not portion of a home farm, in 1861, it would not be a home farm now when he got it. There were stated to be 600,000 agricultural holdings in Ireland, and, if the definition of a home farm pressed on them by Mr. Hume was correct, he (Judge O'Hagan) did not see why at least 500,000 should not be termed home farms, and the whole Act of Parliament repealed in every case in which there had been a letting of any part of one of those farms. Having, then, no doubt on the point, the Court dismissed the appeal with costs.

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v.
Simpson.

O'Hagan, J.

In the case between the same parties, and referred to by O'Hagan, J., Morris, C.J., delivered the following Judgment:—

May 3,
1883.

Morris, C. J.

MORRIS, C. J.—We have no hesitation in answering the questions submitted to us by the Lord Chief Baron. It is a plain case in which the tenant is clearly entitled to have the decree reversed, for this reason:—His lease expired at such a period that, admittedly, under the 21st section of the Land Law Act, he became a “present tenant.” The only right to recover possession of the land, therefore, would be if the landlord could show the Court that the case came within any of the exceptions of the Act. It was alleged to come within the exception if it was proved to be a “home farm.” Now, I wish to call attention to the fact that the words “home farm” are words unknown in a great part of Ireland, and are very well known in England, as being a farm occupied for the convenience, appurtenant to, and in connection with, and for the advantage of, a place of residence. But, giving the term the widest construction, how is the case of the plaintiff an exceptional one? The plaintiff appears to be an agricultural tenant, holding land in the County of Antrim; and he chose to let for twenty-one years a part of his farm; not a part

which could be described as a "home farm," but an ordinary farm. There is nothing exceptional in the character of the farm. It is merely a case where a party sub-let part of his farm; and it cannot be described as a "home farm." Therefore the ejectment should be dismissed with costs.

HARRISON, J., concurred.—MacDevitt, 245.

Land Com.
May 3,
1883.

Gamble
v.
Simpson.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., and FITZGIBBON and
BARRY, L.JJ.)

Hamilton v. Sharpe.

Land Law (Ireland) Act, 1881, sections 5, 21, 28—"Home farm"—Resumption of, by landlord.

In 1844 R., who was a practising physician resident in Liverpool, purchased the lands of M., situate in the County of Antrim, and containing about 100 statute acres. There was then upon the lands an ordinary farmer's dwelling-house, besides two labourers' cottages and farm buildings. R. shortly afterwards let the greater part of the lands for twenty years, but retained in his own hands the dwelling-house, with four acres adjoining it. Before 1852 he had spent over £2,000 in erecting on the site of the old dwelling-house a gentleman's residence, which he thenceforward permanently occupied till his death in 1864, together with the residue of the land included in his original purchase, of which (with the exception of 14 acres, let to one F.) he had got up possession on compensating the tenant. On

Appeal.
Case stated.
January 25,
1887.

Appeal.
Case stated.
January 25,
1887.

Hamilton
v.
Sharpe.

R.'s death his nephew and devisee H., who was also a medical practitioner in Liverpool, retained the dwelling-house and four adjacent acres, but made a lease to S. of 61 acres of the lands for twenty-one years from 1st November, 1864; and also let to him 17 acres more thereof on a temporary tenancy from year to year. In October, 1885, H., who had got up possession of F.'s 14 acres and of S.'s 17 acres, and contemplated retiring from practice, and coming to reside at M., served notice on S., under section 21 of the Land Law (Ireland) Act, 1881, of his intention to resume possession of the 61 acres as a "home farm." This application was dismissed by the Sub-Commission, and subsequently on appeal by the Land Commission, who, however, stated a case for the opinion of the Court of Appeal, finding—(1) that the landlord was desirous to resume the holding for the *bond fide* purpose of occupying the same; (2) that he *bond fide* intended to use the said holding, when resumed as a farm, or portion of a farm: and (3) that such farm would, from its situation, be a farm in connection with his residence.

Held, by the Court of Appeal (who prefaced their order with a declaration that they understood, "from the case stated by the Irish Land Commission, that the landlord desired to resume the holding in question for the *bond fide* purpose of keeping the same as a farm, to be used for the convenience or advantage of his residence, and in connection therewith, and not merely as an ordinary farm, to be used for the purpose of profit"), reversing the decision below, that the holding was a "home farm," which the landlord was entitled to resume, under section 21.—L. Rep. (Ir.), vol. xx., 224.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before PORTER, M.R., & FITZGIBBON & BARRY, L.JJ.)

FitzGerald v. Merritt.

*Land Law (Ireland) Acts, 1881 and 1887—Home farm—
Definition.*

Appeal by the landlord, Francis Merritt, from an order of the Land Commission dated 11th December, 1891, fixing the fair rent of the tenant's holding, the subject of the case, at £133, the landlord's contention being that the holding was a "home farm" within the meaning of section 58 (2) of the Land Act, 1881; and that, therefore, a fair rent could not be fixed upon it.

Appeal.
May 5,
1892.

The tenant served an originating notice. By an order of a Sub-Commission dated 17th April, 1888, the fair rent was fixed on the holding comprised in the lease at £115. From this order both the landlord and the tenant appealed, and the appeal was heard by Mr. Justice Bewley and Mr. Commissioner Fitzgerald, who by order of the 11th of December, 1891, fixed the fair rent at £113, but in all other respects confirmed the said order of 17th April, 1888. From this order the landlord appealed.

It was proved on the part of the tenant that the tenant was a cattle-dealer, and that he used the holding largely as a stand for the cattle he bought. One of the tenant's valuers valued the holding at £71 6s. per annum, and another at £74 10s. per annum. On behalf of the landlord the lessor gave evidence as follows:—
"I have lived in Prospect House, which adjoins the holding, for the last forty years. My husband had the entire lands, including the present holding and Prospect House and grounds, in his own possession. He was a gentleman of means. The lands were in my husband's

Appeal.
May 5,
1892.

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v.
Merritt.

occupation up to his death, and subsequently in my occupation up to the date of the lease to the present tenant. There are no farm buildings, except those close to my residence; and under the lease the tenant has the joint use with me of the farm-yard. The lands were farmed by my husband and myself in connection with our residence. Mr. FitzGerald brings large numbers of cattle on the land, and sometimes they remain there for only a few hours." *Cross-examined*—"My husband used the present holding as a farm; he tilled about 8 or 9 acres, and kept cattle on the rest. He and I kept a dairy, and sold the produce in the city of Waterford."

Mary Merritt gave evidence as follows:—"I am a daughter of the last witness. Mr. FitzGerald brings a large number of cattle on the lands from time to time. On the 1st April last there were two hundred or three hundred head of cattle on it. The numbers were changed ten or twenty times during the month of April."

W. H. Smith gave evidence as follows:—"I know the neighbourhood of these lands. There is a large number of residential holdings within an area of a mile. Mr. Dobbyn's place is on one side of it. Prospect House is residential."

The landlord's valuer valued the lands at £129 per annum, and the buildings at £5 per annum.

The Court affirmed the decision of the Land Commission, on the grounds that it would be incorrect to hold that every farm adjoining a residence is a home farm, and that there was not evidence in this case to show that the holding was a home farm. And they did not define a home farm, but said that the definition of a home farm given in *Musgrave v. Hanley* (M'Devitt's Reports, p. 333), and which was approved of in *Hamilton v. Sharpe* (20 L. R. I., 224), was the nearest in correctness that they knew of.

See *Hamilton v. Sharpe*, ante.—I. L. T. R., vol. xxvi., 118.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before LAW, C., MAY, C.J., SIR E. SULLIVAN, M.R.,
MORRIS, C.J., PALLES, C.B., DEASY and FITZ-
GIBBON, L.JJ.)

Adams v. Dunseath.

Fair Rents—"Improvements"—"*Predecessor in title*"—
"*Compensation by the landlord—Land Law (Ireland)*
Act, 1881, section 8, sub-section 9—Land Act of 1870,
section 4.

LAW, C.—This is a case stated by the Land Commission in respect of certain questions of law arising in a proceeding before it for fixing a fair rent of a tenant's holding, under the 8th section of the Land Law (Ireland) Act, 1881.

Appeal.
1882.

The facts of the case, as stated by the Land Commission, are as follows :—

The holding consisted of about 42 acres of the lands of Kildowney, in the County of Antrim, originally part of the estate of Lord Mountcashel, but now by purchase and subsequent devolution become the property of a Mrs. Dunseath.

In 1842 some 33 acres, statute measure, of the present farm were held by one James M'Kee, but how or at what rent does not appear. In that year, however (1842), Lord Mountcashel had the lands re-valued, and the rent fixed at £26 11s. 6d., which rent was thenceforward paid by the tenant. It is stated that a lease was verbally promised to Mr. M'Kee, and, accordingly, on the 2nd March, 1846, a lease was executed to him of his farm, at the rent already arranged in 1842 ; similar

Appeal.
1882.

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Dunseath.

Law, C.

leases being executed on the same day to nine other tenants on this same townland, all alike, for the same term of thirty years from the 1st November, 1845.

In the interim, however, between the re-valuation or arrangement of the new rent in 1842, and the actual execution of the lease on the 2nd March, 1846, M'Kee rebuilt the dwelling-house, and this particular "improvement" raises one of the questions in the present case.

M'Kee, having got the lease in March, sold the farm to John Adams in the following October for £240, the assignment being dated the 27th October, 1846.

John Adams, having thus bought the farm, proceeded to make further improvements thereon. He erected certain buildings, reclaimed waste land, made fences and drains, and also a farm road. He died about the year 1869, and the farm then vested in his son David Adams, the present tenant.

Meanwhile, in the year 1851, the Mountcashel estate was sold by the Commissioners for the Sale of Encumbered Estates, and the townland of Kildowney being purchased by a Mr. Dunseath, was conveyed to him by a deed, dated the 30th April, 1851, subject, of course, to the existing leases and tenancies as specified in the schedule; turning to which, we find a number of leases, dated the 2nd March, 1846, and amongst them this particular lease, referred to as then vested in the representative of James M'Kee. Mr. Dunseath died in 1869, and the property so purchased by him thereupon vested in his widow, Mrs. Dunseath.

David Adams, who, about the same time, succeeded his father in the leasehold, made further improvements on the farm. These improvements consisted of reclamation, and the making of new fences and drains. He also from time to time before the expiration of the lease took from Mrs. Dunseath, as yearly tenant, some pieces of bog adjoining, I suppose, his leasehold, the quantity

being in all about 9 statute acres, and the rents amounting in the aggregate to £4 10s. Some parts of this bog land also he is stated to have reclaimed.

Appeal.
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The lease expired on the 1st of November, 1875, and thereupon Mrs. Dunseath had the lands comprised in it re-valued, and a rent of £31 17s. 6d. assessed on it. This, added to the £4 10s., the rent of the bog, made the rent of the whole amount to £36 7s. 6d., which the tenant has hitherto paid accordingly, but now seeks to have reduced, as not being a fair rent under all the circumstances of the case.

The case was heard by three Assistant Commissioners, who, by their order of the 19th November, 1881, determined that the fair rent of the holding was £30 15s. From this decision both tenant and landlord appealed to the Land Commission itself, who re-heard the case on the 9th of January. On the occasion of this re-hearing, Mr. Holmes, as counsel for the landlord, submitted certain requisitions to the Commission, calling on them to decide as matters of law:—

“ 1. That the landlord is entitled to rent in respect of all improvements made previous to the expiration, on the 1st November, 1875, of the lease of 1846, inasmuch as such improvements were not made by the tenant or his predecessor in title; or, if the Court should refuse to act on this view, then

“ 2. That the landlord is entitled to rent in respect of all improvements made during the currency of the lease, except those made by the present tenant himself, inasmuch as his predecessors in occupancy were not his predecessors in *title*.

“ 3. If the Court declined to accede to requisitions 1 and 2, then (*a*) that the landlord is entitled to rent in respect of all improvements made prior to the lease of 1846; and (*b*) that the landlord is entitled to *some* rent in respect of improvements made during the currency of the lease, on the ground that (1) under the final

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clause of section 4 of the Landlord and Tenant (Ireland) Act, 1870, some deductions *must* be made in ascertaining the tenant's interest in such improvements from the value thereof; and upon the further ground (2) that by holding under lease he has been, if not altogether, to some extent, 'compensated' for his improvements."

The Commissioners declined to accede to these requisitions, or any of them; but, on the application of Mr. Holmes, as counsel for the landlord, they agreed to state the facts of the case, and submit his propositions for the consideration and decision of this Court.

The questions, accordingly, with which the present case concludes are merely Mr. Holmes' requisition in an interrogative form. Now, however well adapted the requisitions were for their original purpose, they are exceedingly difficult, if not practically impossible, to answer clearly when thus turned into questions. Some of them propose a single legal question as applied to different states of facts; and, in short, any precise answer to them would require so many qualifications and distinctions, that we have thought it better on the whole to extract for ourselves, and answer, the purely legal questions which arise in the case as stated, leaving the Land Commission to apply our answers to the facts as they have already been, or may hereafter be, found by them.

The questions of law, then, which appear to be presented by the case are these:—

I. What is the meaning of the word "improvements" in the 9th sub-section of section 8 of the Land Law Act, 1881?

II. Has the expression "his predecessors in title," as applied to the tenant in that sub-section, the same meaning as in the 7th section of the Act?

III. Are the provisions of the final paragraph of the 4th section of the Land Act of 1870 (as to a tenant

claiming compensation for improvements made before the passing of that Act) applicable to such improvements in determining what is a "fair rent" under the 8th section of the Act of 1881?

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IV. Where a tenant, holding by lease, makes improvements, is enjoyment by him or his successors during the residue of the lease "compensation by the landlord" within the meaning of the 9th sub-section of section 8 of the Act of 1881?

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V. Does the lease of the 2nd March, 1846 (Lord Mountcashel to James M'Kee), preclude the tenant from being regarded as having any interest in respect of the improvements made (that is, the house built) before the execution of that lease, in determining what is the fair rent of the holding, under the 8th section of the Act of 1881?

We think that distinct answers to these several questions will practically solve all the legal difficulties presented by the case.

Before proceeding, however, to answer the questions, it is necessary to notice one important matter:—

The case does not state that the holding of David Adam is subject to the Ulster tenant-right custom; and, therefore, we must for our purposes assume that the tenant is not entitled to the benefit of that custom. This, indeed, is substantially implied, as well by the questions originally proposed to us, as by those which we have framed for ourselves; for the doctrine of *Holt v. Harberton*, and that class of cases, has never caused any difficulty with respect to any Ulster tenant-right holding. The tenant of such a holding has always had the right to sell it as it stood, with its improvements on it, and never thought of claiming compensation for them from the landlord under section 4 of the Act of 1870. On the other hand, any landlord insisting on rent in respect of improvements made not by himself, but by the tenants for the time being, whether holding under

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one continuous tenancy, or under distinct successive tenancies, transmitted from one tenant to another, has always, I apprehend, been dealt with as infringing on the custom by thus demanding what was unreasonable and unfair.

Our answers, therefore, to the questions in this case must not be taken as applicable to an Ulster tenant-right holding, but only to one subject to the general law.

The following were the questions submitted to the Court of Appeal, with the answers of the Court to each:—

I. What is the meaning of the word “improvements” in the 9th sub-section of section 8 of the Land Law Act, 1881?

Unanimously answered: That the meaning of the term “improvements” is the same as in the Landlord and Tenant (Ireland) Act, 1870, section 70.

II. Whether the terms “tenant or his predecessors in title” in the same sub-section have the same meaning respectively as in the 7th section of the same Act?

Answered in the affirmative. May, C.J., Morris, C.J., and Deasy, L.J., dissenting.

III. Whether the provisions of the final paragraph of the 4th section of the Landlord and Tenant (Ireland) Act, 1870, as to improvements made before the passing of that Act, are applicable to such improvements in determining fair rent under the 8th section of the Land Law (Ireland) Act, 1881?

Answered in the affirmative. The Lord Chancellor dissenting.

IV. Whether the enjoyment, during the currency of a lease, of improvements made by a tenant during such lease is a compensation by the landlord within the meaning of the 9th sub-section of section 8 of the Land Law (Ireland) Act, 1881?

Unanimously answered in the negative.

V. Whether the lease of the 2nd of March, 1846, excludes the tenant from any interest in respect of the house built before the execution of that lease in the ascertainment of the fair rent of the holding under the Land Law (Ireland) Act, 1881?

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Answered in the affirmative. The Lord Chancellor, the Lord Chief Baron, and the Master of the Rolls dissenting.

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NOTE.—It is not possible in the compass of this volume to give more than the above digest of the decision in this important case, the full report of which will be found 10 L. R. I., 109, where it occupies ninety pages. The different points involved in the case are, however, fully dealt with in the abstracted evidence of Lord Justice FitzGibbon, *ante*.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before WALKER, C., SIR PETER O'BRIEN, C.J., and FITZGIBBON and BARRY, L.JJ.)

Clements v. Tighe.

Application by lessee to fix fair rent—Exemption from rent on account of buildings erected by lessee—Condition against compensation for improvements at end of term—Land Law (Ireland) Act, 1887, s. 1.

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Jan. 17-30,
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The first section of the Land Act of 1887 merely anticipates future rights under the 21st section of the Land Act of 1881, for the benefit of tenants who, on the expiration of leases existing at the passing of the Act of 1881, would have the right to be deemed tenants of present ordinary tenancies from year to year. It brings the rights of such tenants into immediate possession, when the necessary conditions exist, but does not enlarge them.

By lease dated the 13th April, 1880, A granted to B a holding for a term of thirty-five years, with the

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condition that if the lease determined within twenty-four years, all claims by the tenant should be satisfied by a payment of £1,100, to be reduced by £110 for every year after the twenty-four if the lease determined at any time subsequent to that period, so that at the expiration of the term the lessee should not be entitled to any compensation whatsoever. The lessee applied on the 25th of March, 1889 (when only nine years of his term had expired), to have a fair rent fixed; and on the 10th July, 1891, it was fixed at £210, compensation being allowed in respect of buildings erected by him, A having required a re-hearing before all three Commissioners.

Held, that the intention of the parties was that, at the expiration of the term of thirty-five years, the lessee should not be entitled to any compensation for improvements; and that, as the Land Act of 1887, section 1, merely anticipated the rights which the tenant would have at the expiration of his lease, but did not enlarge them, the tenant was not entitled to compensation for buildings, although only nine years of his term had elapsed.

Case stated by the Irish Land Commission for the consideration and decision of Her Majesty's Court of Appeal.

The following cases were referred to:—*Hodges v. Clarke* (1), *Adams v. Dunseath* (2), *Moylan v. Finch* (3), *Barton v. Atkinson* (4), *Looby v. Finch* (5), *Perrot v. Dennis* (6).

WALKER, C.—The question submitted to us by this case is, whether the lessee, in fixing the fair rent of his holding, is entitled to be exempted in respect of the buildings erected by him or his predecessors in title. The argument before us proceeded upon two admissions as to legal results, which we assume to be correct for the purposes of our decision: (1) that the tenant would be exempted from rent only in a case where he would

be entitled to compensation for improvements in respect of these buildings; and (2) that if the lease in the present case had expired by effluxion of time, its provisions in such an event are sufficient to exclude the present claim.

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The lease bears date the 13th April, 1880. It is for a term of thirty-five years, and at a rent (as reduced) of £266, and, under the circumstances, it was competent for the lessee to exclude himself by contract in it from compensation for improvements. The lease contains a strict covenant against alienation, and also a curious clause giving a right of purchase to the lessor, on the happening of any one of the therein named events, at a sliding scale of prices, so adjusted that if the event giving the right of pre-emption happened at a date conterminous with the end of the term of thirty-five years, the lessor should not be liable to any claim in respect of compensation or otherwise howsoever.

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The lease also contains a clause enabling the lessee "absolutely to determine the lease by surrendering the same," on giving six calendar months' notice in writing, and on the lessee "delivering up the premises and all buildings thereon" in good condition; and in that event the lessor was bound to pay a sum of money fixed, "if such determination of said lease shall be made before the 25th March, 1904," at the sum of £1,100, and diminishing thenceforward by a sliding scale to the end of the term, so that if the surrender was conterminous with the expiration of the term, the lessor should not be liable to any claim under the Land Act of 1870, or otherwise howsoever. The words of the clause, "absolutely to determine the lease by surrendering the same," and by "delivering up the premises and all buildings thereon," are in strange contrast to the argument of the tenant before us. This is a lease within the 21st section of the Act of 1881, and, therefore, if the Act of 1887 had not passed, the lessee in 1915, on the

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expiration of his lease, would be deemed to be a tenant of a present ordinary tenancy from year to year, at the rent and subject to the conditions of his lease, so far as such conditions would be applicable to a yearly tenancy ; but it is, I think, clear that in such a case he could not be held exempted from rent in respect of these buildings, for they would have already become the property of the landlord when the year 1915 was reached.

But the Act of 1887 was passed, which enables a lessee, if he choose, to make a particular form of application to the Land Commission by virtue of which he is *ipso facto*, against the will of the landlord, "deemed to be a tenant of a present tenancy in like manner, and subject to like conditions, as if his lease had expired ;" and his holding thereupon is to be subject to all the provisions of the Act of 1881 with regard to present tenancies, as if the tenancy were a yearly one. Mr. Clements exercised that option on the 25th March, 1889, and *prima facie* it would seem he could not be better applying under the Act of 1887 than if he waited till he could apply under the Act of 1881. But Mr. Kehoe argued that the tenant was in a better position when he applied under the Act of 1887 ; and his ingenious contention comes to this : he does not dispute that the words "expiration" and "expire" in section 21 of the Act of 1881, and the word "expired" in section 1 of the Act of 1887, must receive the same construction ; but he says that "expire," in section 21 of the Act of 1881, includes "surrender," for which proposition he cites *Hodges v. Clarke* (1), comprising a surrender under the terms of the present lease, and that the service of the notice under the Act of 1887 is equivalent or analogous to a surrender under which the lessee would be entitled to claim £1,100 compensation.

That argument involves, of course, (1) the correctness of the decision in *Hodges v. Clarke*, and (2) its application

to the present case. Both of these consequences have been challenged before us. It is, I think, wholly unnecessary for me to express an opinion upon *Hodges v. Clarke* (1), and I hold myself quite free to consider that decision in any case where the point involved in it arises. But here there was never any surrender in fact, nor any surrender by an act referable to the contract of both lessor and lessee. The accelerated determination of the lease was, by an act of the lessee, against the will of the lessor. The vice of the argument is, that it treats the tenancy at the same moment as determined and as undetermined; and the obvious injustice of the contention is, that the tenant perpetuates the tenancy, while he claims money from the landlord for yielding up the lands to him. It is to my mind clear that where the tenant, for his own purposes, accelerates, under the Act of 1887, the natural expiration of the lease (as he has a right to do), he must be deemed to assume the consequences of the natural expiration of the lease, along with the imputed expiration, and that, having chosen, against the will of the lessor, to put himself in the same position as if he were applying in 1915, he must bear the burden, as well as the benefit, resulting from his own option.

The result is, that we must answer the question put to us by saying that the lessee in the present case is not entitled to be exempted from rent in respect of the buildings in question.

Sir Peter O'Brien, C.J., FitzGibbon, L.J., and Barry, L.J., concurred.—Ir. R., vol. ii., 101.

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Land Com.
1895.LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Warnock *v.* Orr.

BEWLEY, J.—The question that arises here is whether the tenant is entitled to be exempted from rent in respect of certain improvements made by the husband of the present tenant during the existence of the tenancy. The holding was held under a lease, dated 12th July, 1866, made by James Orr and Adam Orr to Robert Warnock, for a term of thirty years, at the yearly rent of £61 5s. The lease was executed four years before the passing of the Land Act of 1870, and contained the most elaborate provisions contracting the lessee out of what ultimately turned out to be his rights under the Act. It contained provisions by which, amongst other things, the lessee was bound, on the expiration or determination of the term, “to deliver up the holding, with all the improvements on it, without demanding any compensation, recompense, or payment for any improvements now made or hereafter to be made upon the demised premises or any part thereof; . . . and all the improvements now made or hereafter to be made upon the demised premises, or any part thereof, shall, on the expiration or on the determination of such term, be the absolute property of the said James Orr, his heirs and assignees, any law or custom to the contrary, or Act of Parliament now existing or hereafter to be made to the contrary, notwithstanding.” Having regard to the contract, which, in the face of the events that happened, was legal, it appeared to be clear that at the expiration of the lease the tenant could not claim any

compensation for improvements under the provisions of the Land Act of 1870 or otherwise; and, that being so, it was now settled by the Court of Appeal in such cases as *Tighe v. Clements*, and also in two cases that went from Belfast, that the tenant on the expiration of the lease would not be entitled to claim for improvements, and if he availed of the Land Acts of 1887 and 1881 during the currency of a lease, he could not claim exemption from rent in respect of those improvements. The Court was of opinion, therefore, that the Sub-Commission were in error in making an allowance to the tenant for the improvements. The old rent was £61 5s.; the judicial rent was £37 10s.; and, considering the evidence of value and other elements in the case, they fixed the new rent at £40.

[Not reported.]

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SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., FITZGIBBON, BARRY,
and WALKER, L.JJ.)

Appeal.
February 28,
1896.

O'Donovan v. Kenmare.

Landlord and Tenant (Ireland) Act, 1870—Land Law (Ireland) Act, 1881—Compensation for disturbance and improvements—Death of a tenant for life—Executors.

The executor of a tenant for life, whose interest in the tenancy has been determined by the death of the tenant, the holding being one to which the Landlord and Tenant (Ireland) Act, 1870, applies, is entitled to compensation for improvements, but (WALKER, L.J., diss.) not to compensation for disturbance.

The plaintiff was the executor of Mrs. O'Leary, of Bantry, who, in October, 1884, agreed with the agent of

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Lord Kenmare for a lease "as demesne lands only" for her own life of the lands in respect of which claims were made for compensation for improvements and disturbance. On the death of Mrs. O'Leary the landlord required possession of the holding which was the subject-matter of the demise from her executor, who set up a claim before the County Court Judge of the West Riding of Cork for compensation on the double ground already stated. The County Court Judge awarded compensation both for disturbance and improvements. Both parties appealed to the Land Commission, by which it was held that the lands were not demesne lands, nor a residential holding, nor a letting for temporary convenience, so as to deprive the tenant of the rights conferred by the Landlord and Tenant (Ireland) Act, 1870, and the Land Law (Ireland) Act, 1881, and that the executor was entitled to compensation for improvements and disturbance. The landlord appealed to the Court of Appeal.

LORD ASHBOURNE, C.—Mr. Ronan, during the argument, abandoned all objection to the award of compensation for improvements, and, as we concurred with Mr. Justice Bewley's view that the lands were neither demesne nor held for temporary convenience, we directed him to confine his argument to the one question—whether or not the personal representative of the deceased tenant was entitled to compensation for disturbance? Mrs. O'Leary was tenant of the lands under a lease for her own life. Mr. O'Donovan, her executor, never was tenant of the lands, and on a writ for possession being served after Mrs. O'Leary's death, he allowed judgment to go by default. Under section 3 of the Landlord and Tenant (Ireland) Act, 1870, a tenant is entitled to compensation for disturbance if "he is disturbed in his holding by the act of the landlord." In the present case, after the tenant's death on the 18th February, 1894, there was neither tenant nor holding.

Can the subsequent going into possession by the landlord be taken as a disturbance within section 3? Must not the person "disturbed" either be, or (as in the case of overholding) have been a tenant? Must there not be some act of the landlord which may be regarded as a disturbance by him of the tenant? Here the landlord did nothing during the lifetime of the tenant in the continuance of the tenancy. Can the landlord's taking possession when the tenancy had been determined, and the tenant dead, be a "disturbance"? If the tenant had died intestate, and no representative had been raised, would the landlord's quietly taking possession be a disturbance? Or if the landlord had thus taken possession, could a personal representative raised to the tenant five years afterwards claim damages for disturbance by the act of the landlord in taking quiet possession? The claim for disturbance and the claim for improvements rest on different grounds. The latter rests on the work and expenditure of the tenant himself, and is payable "on quitting the holding," whether by act of the tenant or landlord; while the former must arise from an "act of the landlord."

It has been pointed out that the appellant's contention on this point leads to some anomalous conclusions. But so would its rejection. In interpreting this difficult code we cannot find a chain of decisions entirely free from anomalies. It has been urged for the respondent that an assignee of Mrs. O'Leary or a tenant *pur autre vie* could make a claim for disturbance, and, therefore, why not the representative of Mrs. O'Leary? Mr. Ronan answers that there is a real difference, as the assignee and tenant *pur autre vie* are both persons who *have been tenants*, and who are in possession after the determination of the tenancy. But on Mrs. O'Leary's death there was no person who had been tenant to make a claim for disturbance. She enjoyed her tenancy during its full duration; she had never been disturbed,

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and how can her executor claim compensation for disturbance? Neither the tenant nor her personal representative was disturbed. If compensation for disturbance were awarded in such a case, why should the personal representative rather than a devisee be entitled to claim it?

The case of *Roe v. Cooney* (18 I. L. T. R. 11, 80), cited for the respondent, may be defended on the words of s. 21 of the Land Law (Ir.) Act, 1881, but does not apply here. In my opinion the Judgment of the Land Commission should be varied as to the award of compensation for disturbance, and otherwise affirmed, each party bearing his own costs of the appeal.

Barry, L.J.

BARRY, L.J.—I concur in the view that the present claimant is not entitled to maintain his claim for compensation for disturbance. By the words of the Act the tenant is entitled to compensation when he is disturbed in his holding by the act of the landlord. Thus, the claimant must be a tenant, which is not so in the present case. Besides, the tenant in order to be compensated must have been “disturbed in his holding by the act of the landlord.” The claimant here was never disturbed. On this clear ground I rest my Judgment.

FitzGibbon, L.J., in a lengthened Judgment concurred.

Walker, L.J., dissented, and agreed with the decision of the Land Commission.—I. L. T. R., xx., 152.

SUB-COMMISSION.

Sub-Com.
November 3,
1896.

(Before BAILEY, A.L.C.)

Morgan v. Kilmorey.

Compensation for improvements—Contract to make an improvement—Valuable consideration—Land Law (Ireland) Act, 1896, section 1 (4) (8).

Where a lease of the year 1811 contained a covenant by the lessee to make certain improvements on the holding, and the tenant now applied to have a fair rent fixed, he was deemed to have been fully compensated for such improvements.

Holdings subject to the Ulster Tenant-Right custom distinguished.

The facts appear in the Judgment.

MR. BAILEY.—The facts of this case are simple. The holding before the Court contains about $4\frac{1}{2}$ acres, and is portion of a larger holding of $13\frac{1}{2}$ acres, which was demised in the year 1811 under a lease for one life, or twenty-one years, which lease expired in the year 1877. The lease contained a covenant that the tenant should erect buildings and fences on the holding. The question now to be decided is whether the landlord is entitled to rent on the houses and fences on the holding, which presumably were erected in pursuance of the covenant in the lease. We have accordingly to consider the meaning and construction to be put on sub-sections 4 and 8 of the 1st section of the Land Law (Ireland) Act, 1896, which deals with compensation for improvements made in pursuance of contracts entered into for valuable consideration. The law on the subject prior to the passing of the Act of the last session of Parliament was plain. A tenant could not claim compensation in respect of any improvement made in pursuance

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of a contract entered into for valuable consideration. This was laid down by sub-section 1 (c) of the 4th section of the Act of 1870. Under the decision in *Adams v. Dunseath* the tenant accordingly was not entitled to exemption from rent on account of such an improvement. Under section 1, sub-section 7, of the Act of last session, the 4th section of the Act of 1870 shall not in future authorize the allowance of any rent in respect of any improvement. The Act, however, also contains the provision (section 1, sub-section 4) that "a tenant shall be deemed to have been paid or fully compensated for every improvement made by him in pursuance of a contract entered into for valuable consideration." If that clause stood alone, there would be no difficulty in the case. However, sub-section 8 proceeds to enact that "for the purpose of this section valuable consideration shall not be held to have been given by reason of the mere letting of the land on lease or otherwise," unless the rent was "fixed" with the object of recouping the tenant for his expenditure of capital and labour in making the improvement. The sub-section concludes: "And in the case of an improvement made in pursuance of a contract entered into for valuable consideration, such object shall be implied where not expressed." The question, therefore, arises, Are the words "valuable consideration," in sub-section 4, to be construed in accordance with the qualifications and limitations contained in sub-section 8? In the case before us, was the mere giving of the lease which contained the contract to erect the buildings and fences, "valuable consideration," there being no evidence that the rent was "fixed" with the object of recouping the tenant?

In law a deed, or a writing sealed or delivered, imports a consideration. The question is: Has this principle been altered or affected with respect to compensation for improvements under the Land Law Acts? The

question of "valuable consideration" arises in sub-sections 4, 5, and 6 of the 1st section of the Act of 1896. Sub-section 4, as we have seen, deals with improvements made in pursuance of a contract entered into for valuable consideration, and provides that all such improvements shall be deemed to have been fully paid or compensated for. Sub-section 5 provides that improvements "not made in pursuance of a contract entered into for valuable consideration" shall not be deemed to have been compensated for, except to the extent to which valuable consideration has been given in respect thereof. Sub-section 6 enacts that a contract by a tenant not to claim compensation for an improvement on quitting his holding shall not authorize the allowance of rent on such an improvement, except to the extent to which valuable consideration has been given by the landlord in respect of the entering into that contract. On first view one would be apt to conclude that valuable consideration in these three sub-sections should be read in accordance with the definition in sub-section 8, and that in no case could the mere giving of a lease be valuable consideration unless it were also shown that some other benefit accompanied such lease. Such a construction would, however, make the final paragraph of sub-section 8 meaningless; for if the giving of a lease was not to be deemed to be valuable consideration without the addition of a certain object, it would be absurd to enact that in the case of a contract entered into for valuable consideration—that is, a contract proved to have already such an object—such object shall be implied where not expressed. There would be no necessity for implying an object which already must have been shown to have existed—which, in fact, could not be implied until it had been previously proved. We must accordingly look for some other construction of the section. A careful reading will show that the words "valuable consideration" occur in two different collocations of words

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in the section. We have "a contract entered into for valuable consideration," and "valuable consideration has been given." Now, the section enacts that in the second of these collocations, where the Court has to decide whether "valuable consideration has been given," the mere letting of the land on lease, unless accompanied by something else—by some additional benefit—shall not be deemed to be valuable consideration. On the other hand, in the first collocation, where it is shown that the improvement was made in pursuance of a contract entered into for valuable consideration, it is not necessary to show any additional benefit or object—"such object shall be implied where not expressed." This construction will preserve to the words "valuable consideration," when used with reference to the making of a contract, their ordinary legal meaning. The giving of a lease imports valuable consideration. Where, however, an improvement is not made in pursuance of a covenant in a lease, then the Court must consider whether the consideration is adequate before they can decide that it is valuable. We must accordingly hold that in this case the landlord is entitled to rent on the improvements made in pursuance of the covenant in the lease.

The holding does not seem to be subject to the Ulster tenant-right custom. Did such custom exist, the important question would arise whether sub-section 4 of the 1st section of the Act of 1896 could be held to apply at all. It is arguable that this section of the Act of 1896, dealing with compensation for improvements, is in substitution for the 4th section of the Act of 1870, and as that did not apply to Ulster-custom cases, neither does this. To hold that it did apply would be to place the tenant of an Ulster-custom holding in a worse position than he was before the Act of 1896 was passed. But section 49 of the recent Act provides that "nothing in this Act contained shall

prejudice or affect any right, benefit, or presumption exercised or enjoyed under or by virtue of the Ulster tenant-right custom, or any usage corresponding thereto." If the application of the sub-sections dealing with compensation for improvements in the Act of 1896 in any way prejudiced or affected the right of an Ulster-custom tenant to improvements made by him, it is evident that such application would not be in accordance with the statute.

[Not reported.]

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LAND COMMISSION.

Land Com.
February 20,
1891.

(Before BEWLEY, J.)

Jordan v. Gibbs.

BEWLEY, J.—As a rule, a party seeking for liberty to intervene should do so on notice; but there may be cases such as this, where it is more satisfactory to proceed by conditional order, since, in the event of no cause being shown, such a course will be the least expensive. We will, therefore, grant a conditional order, to be served upon the tenant, and upon the superintendent of the Church Department, Irish Land Commission.—I. L. T. R. xxv., 28.

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SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before PALLES, C.B., and FITZGIBBON and
BARRY, L.JJ.)

Barton v. Atkinson.

Lease by limited owner for term of years, if lessor should live so long—Land Law (Ireland) Act, 1881, s. 21 — Land Law (Ireland) Act, 1887, s. 1.

B, the lessee, held under a lease from A and his wife for the term of thirty-five years if A shall so long live ; the lease contained a covenant on the part of the wife for better assuring the demised premises to B, during the said term of thirty-five years, in the event of her becoming entitled to any estate therein during the life of A. At the date of the execution of the lease the lands were subject to the trusts of a marriage settlement whereby they were limited to trustees on trust to receive the rents, and pay them to A for life, but, in the event of the bankruptcy of A, to his wife for her separate use during the life of A. B applied to have the fair rent of the lands comprised in the lease fixed by the Land Commission.

Held, that the lessee was not entitled under section 1 of the Land Law (Ir.) Act, 1887, to have a fair rent fixed.—L. R. I., xxx., 396.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
June 13-24,
1892.

(Before LORD ASHBOURNE, C., and FITZGIBBON and
BARRY, L.JJ.)

Looby v. Finch.

Lease in consideration of a fine, for a term of thirty-five years, made by a tenant for life, without a power of leasing—Land Law (Ireland) Act, 1881, s. 21—Land Law (Ireland) Act, 1887, s. 1.

A tenant for life under a will, which contained no power of leasing in consideration of a fine, executed a lease for twenty-five years.

The Sub-Commission (Edge, A.L.C.) held the tenant entitled to fix a fair rent on the holding, on the grounds that the landlord was estopped from any attempt to resist his claim. The Land Commission (Mr. Justice Bewley) dismissed the originating notice.

On appeal by the tenant the Supreme Court reversed the decision of the Land Commission, with costs, and held, that the lessor could not prevent the lessee from fixing a fair rent of the lands so demised.

Massy v. Norse, Barton v. Atkinson, and Moylan v. Finch referred to.

LORD ASHBOURNE, C.—In this case the tenant, claiming as a lessee, served an originating notice which was heard by a Sub-Commission, presided over by Mr. Edge, who held that the case came within the Act of 1887, and fixed the fair rent of the holding. The landlord required that the application should be re-heard before the Land Commission, who came to the conclusion that the tenant was not entitled to have the fair

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rent of his holding fixed, and dismissed the originating notice. From that decision the tenant has in his turn appealed to this Court; and we have to consider whether the tenant, who claims to hold the lands in question under a lease, dated 26th March, 1875, for a term of thirty-five years, is a lessee who, on the expiration of his lease, would be deemed to be a tenant of a present ordinary tenancy from year to year within the meaning of the Act of 1881, or, rather, whether his landlord is in a position to assert that he is not so entitled.

The landlord of the holding in this case, Captain John Finch, is tenant for life under the will of his father, William Finch; this will contains no power of leasing. The holding was originally demised by a lease, dated 7th May, 1855, from William Finch to W. H. Carroll, for the term of the lessee's life, or twenty-one years. Carroll sub-let the lands to two men named David Connor and Timothy Looby. By an agreement in writing, dated 6th March, 1869, John Finch, who was then tenant for life in remainder expectant on the death of Edward Finch, in consideration of a fine of £150, promised on the expiration of Carroll's lease to give the lands to these two sub-tenants at a rent to be fixed by arbitration. Edward Finch subsequently died, and Carroll surrendered his lease to John Finch. The agreement was then carried into effect, and John Finch, by a lease dated 26th March, 1875, demised the holding to Timothy Looby, to hold for a term of thirty-five years, at a yearly rent of £201.

These being the circumstances under which the tenant obtained possession of his holding, though the lease contains no mention of the fine, I take it as absolutely certain that the lease was made in pursuance of the agreement of 6th March, 1869, and consequently there attaches to the lease every infirmity which results from the lessor being a limited owner, who, without authority, has made a lease in consideration of a fine.

As the tenant for life had no leasing power given to him by his father's will, and did not comply with the statutory provisions which would have enabled him to execute a valid lease, it is obvious the lease is void against the persons entitled in remainder. It is, therefore, equivalent to a lease for a term of thirty-five years, if John Finch so long live. Accordingly, it will come to an end in either of two ways, either by the death of John Finch during the currency of the term, or by the efflux of the thirty-five years during the life of John Finch. For this reason Mr. Justice Bewley thought the case was governed by *Barton v. Atkinson* (1). In that case the landlord made a lease for twenty-one years, if he should live so long. The lease in *Barton v. Atkinson* (1) might have expired in either of two ways, either by efflux of the term, or by the dropping of the lessor's life. It was only in the former event that the lessee could have had the benefit of the 21st section of the Act of 1881—*Massy v. Norse* (2); and on this ground—the contingent nature of his rights on the termination of his lease—the Court of Appeal held he could not claim the benefit of the Act of 1887. The Lord Chief Baron clearly states the grounds of this decision. He says (at page 407):—"The element which here excludes the tenant from the Act of 1887 is not the duration of the lease, which is unquestionably within the Act, but the contingent character of this title under the Act of 1881." There is an obvious distinction, however, between that case and the present. The contingency there arose from the contract between the lessor and the lessee. It was apparent on the face of the lease. That is not the case here. John Finch has contracted to give the tenant an absolute term of thirty-five years; if the lease is determined before the expiration of that term, it is only by reason of the landlord having failed to make valid a lease in respect of which he has received a fine.

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Reference has been made to *Massy v. Norse* (1). There a lease had been given to the tenant by two limited owners to hold the lands for their own lives, and on the death of the survivor, the plaintiff, who was entitled in remainder, brought an ejectment. The Court held that there was no tenancy arising under the 21st section of the Act of 1881, which would enure for the benefit of the tenant on the expiration of his lease, so as to bind the remainder-man. But there was no question in that case, except whether the lease granted by the preceding tenant for life, expiring with his estate, gave the lessee any right under section 21 against the remainder-man. It was not a case between lessor and lessee.

Moylan v. Finch (2) has also been referred to. It arose between this landlord and another of his tenants to whom he had demised a farm to hold for his (the landlord's) own life. The learned Assistant Commissioner, Mr. Bailey, before whom the case was argued in the first instance, came to the conclusion that it was governed by *Massy v. Norse* (1), and held that as the landlord's estate would terminate at the same time as the lease, no tenancy, by virtue of section 21 of the Act of 1881, could spring up to enable the tenant to fix a fair rent. That decision was appealed from, and the point was ultimately argued, on a case stated, before this Court, where the view taken by the Sub-Commission was upheld. I do not think the decision in *Moylan v. Finch* (2) strengthens the position of the landlord here. In this case Captain John Finch has purported to make a lease, not for his own life, but for an absolute term of thirty-five years. It is remarkable that a case turning on a lease made for the same number of years, and by the same landlord, as the present lease, was heard by the same Sub-Commission, at the same time as *Moylan v. Finch* (1); and in his Judgment Mr. Bailey distinguishes the two cases. If the present

lease be held invalid, a yearly tenancy must be held to have sprung up between the parties, the tenant having been in possession, and having paid his rent since 1875. But when the tenant tried to treat himself as a tenant from year to year, and served his originating notice under the Act of 1881, the landlord contended that he was a leaseholder. Now, when the tenant claims as a leaseholder, the landlord, though he has contracted to give the tenant an absolute term for thirty-five years—though he has taken a fine for the lease, and keeps the money in his pocket—contends that the lease he executed himself is invalid, or at least determinable on a contingency before the expiration of the term, and that, therefore, the tenant has no rights under the Act of 1887. He says the lease is bad against the remainder-man, and that, therefore, it is bad against himself, even although he made it, and took a fine for making it. This is not a contention that lends itself to the sympathy of the Court to which it is addressed. I think it is unjust to let the landlord, contrary to his own lease, put forward any such contention. I think he is practically estopped by his own lease from saying that it is not what it purports to be; and accordingly, leaving the rights of the remainder-man to be determined when they arise, I am of opinion that this lessor is not free to deny the rights of his lessee to fix a fair rent now against himself (the lessor), and that accordingly the appeal should be allowed with costs.

FitzGibbon and Barry, L.JJ., concurred.—L. R. I., xxx., 568.

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Rolls.
November 7,
1896.

(Before PORTER, M.R.)

M'Evoy v. M'Evoy.

*Lease pur autre vie limited to heir as special occupant—
Effect of order fixing fair rent—Conversion into
personality.*

G., by indenture of lease, demised to J., his heirs, executors, administrators, and assigns, the lands of M., for one life or thirty-one years. Under the will of J. the lands became vested in P. An order fixing the fair rent was made on the application of P. In a suit to administer the assets of P:

Held, the life not having dropped, that the order fixing the fair rent operated as a conversion as between the heir-at-law and the personal representative of P., and converted the farm into personality.

By lease dated the 17th September, 1853, Viscount Gormanston demised to John M'Evoy, his heirs, executors, administrators, and assigns, the lands of Muff, in the County of Meath, for the life of His Royal Highness the Prince of Wales or thirty-one years. John M'Evoy died on the 18th October, 1880, and under his will his son, Philip M'Evoy, became entitled to the lands. On the 27th September, 1887, Philip M'Evoy served an originating notice to have a fair rent fixed; and on the 29th June, 1888, an order was made fixing the fair rent at the old rent. Philip M'Evoy died on the 1st May, 1893, intestate, and on the 22nd June, 1893, letters of administration of his personal estate and effects were granted to the defendant, Patrick M'Evoy. The heir-at-law, who was also one of the next-of-kin, was a man named Luke M'Evoy.

On the 15th May, 1895, a decree was made for the administration of the personal estate of Philip M'Evoy. On the 1st July, 1896, the Chief Clerk made his certificate, finding that the farm was part of the personal estate of Philip M'Evoy. On behalf of Luke M'Evoy it was sought to vary the certificate by a declaration that as heir-at-law of Philip M'Evoy he was now entitled to the farm.

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PORTER, M.R.—No special circumstances are to be found in this case. The question turns on section 1 of the Land Law (Ireland) Act, 1887, which brings us back to section 21 of the Act of 1881. It was stated during the argument that the question had not been actually decided; but, on investigation, this view can hardly be taken to be correct. There are several reported cases having an important bearing on the point, which I shall now proceed to consider. In *Smyth v. Moore* (32 L. R. I., 129) the Court of Appeal had under consideration the acquisition by a leaseholder of the *status* of a present tenant. Something turns on what was done in that case. The Land Commission had submitted certain questions for the decision of the Court. The questions are to be found at page 131 of the report. The second answer is the important one. The Court decided that service of an originating notice had not, *per se*, the effect of conferring the *status*. The case is not a distinct authority on the present point; but the language used is eminently suggestive of the views the Court would have taken upon it, though, as I say, it did not decide it. The point, however, is, in my opinion, directly involved in the decision in *Connolly v. Tyrrell* (32 L. R. I., 97). It is true that the question is not put categorically; but the decision in that case admits of no doubt that the view I take has the advantage of being supported by the high authority of Walker, L.J., then Lord Chancellor. In *Sturges v. Ryan* (24 L. R. I., 305) a very curious question arose as to the liability of the

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original lessee, under the covenant in the lease for payment of rent, to pay to the lessor certain gales of the judicial rent, which, on the application of the assignee of the lease, had been fixed on the premises demised. In that case the Queen's Bench Division held that the defendant was not liable to pay either the rent in the lease or the reduced rent. It seems to me that if the fair rent had been the same as the old rent, as in the present case, the same point is involved in the decision. But there is a case which comes nearer than any of these to the present case, and, in my view, is a direct decision upon the point. I refer to the case of the *Ulster Bank v. Parke*—a decision of the Vice-Chancellor pronounced on Nov. 12, 1895. Still that case cannot be treated as a contested one, as the heir-at-law was not represented. Of the other cases cited, *In re Gray*, 1894 (1 Ir. R., 65), turned on a different point; *Mairs v. Lecky* (29 I. L. T. R., 42) has little bearing on the present case; and the same observation applies to *Knox v. Baxter* (19 L. R. I., 460), which decides that turbary and other rights of a similar nature belonging to the tenant prior to the fixing of the fair rent remain unaffected by it, if not necessarily inconsistent with the new relations of the parties. That there is a new relation is to my mind quite clear. The fixing of the fair rent kills the existing term. Whatever meaning is to be attached to the much-criticised phrase "shall be deemed," it must here mean "shall be dealt with." The view taken by the Court amounts to this, that if a lessee elects to go into Court, and has a fair rent fixed, he thereby accelerated the determination of his lease. He cannot be tenant under a lease and tenant from year to year at the same time. It is impossible to imagine such a condition of things. Acquiescing, as I do, in the views expressed by O'Brien and Johnson, JJ., in *Sturges v. Ryan*, I think it logically follows that the lease is itself terminated. Mr. Carton argued that the

effect of the Act of 1887 was to leave the lease still subsisting, while it enabled the rent to be periodically varied. This would not have the effect of making the lessee a present tenant. It is a curious thing that this question never occurred to the framers of the Act or of those which followed it. For my part, I should regard it as one of urgent importance. As to the argument that my decision would be productive of hardship in the case of the heir-at-law, I can only say that the fair rent was fixed on the application of the lessee himself, under whom all the parties derive. That being so, I cannot see how any question of hardship comes in. I must, therefore, refuse the application to vary the certificate. All parties must have their costs.—I. L. T. R., xxx., 162.

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LAND COMMISSION.

Land Com.
December 24,
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(Before ROSS, J., FITZGERALD, Q.C., and O'BRIEN,
Commissioners.)

Good v. Dunne.

ROSS, J.—In this case the tenant held under lease for 120 years from 1869 the lands at Bolaling, consisting of 243 acres, and the lands of Glenary, 355 acres. The lessor held under different head-landlords. He has since been evicted. The head-landlord of Bolaling has taken Good as his tenant at a rent of £95, the valuation being £139 10s. By agreement between the parties the rent of Glenary is to be fixed by the Land Commission. A fine of £1,100 was paid by Good's predecessor for the lease of 1869. It has subsequently been twice assigned for £900. Two questions have been raised by the tenant: 1st, That the buildings which were sufficient for

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Bolaling and Glenary are excessive for Glenary as a separate holding. We think the buildings are in excess of the requirements of Glenary, and have yielded to the tenant's contention, and fixed the rent accordingly. In the second place, it has been contended that we should take the fine into consideration in fixing the fair rent; that the case of *Mollan v. Kieran*, decided by the Head Commission, has been impliedly overruled by the Court of Appeal in *Clinton v. Lanyon*. It is not necessary for us to decide this question. The latter case at most decided that it is within our discretion to take it into consideration. Having heard the evidence of Mr. Bass as to the circumstances under which the lease was made, we are of opinion that it would be unjust to give effect to this consideration in the present case. The judicial rent was £89 10s., and we now fix it at £78.

See *Kieran v. Mollan*, and *Lanyon v. Clinton*, *ante*.

Land Com.
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LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C., and
O'BRIEN, Commissioners.)

Garnett v. Garnett.

Landlord and tenant—Sub-tenancy determined by judgment in ejectment for non-payment of rent and service of eviction notices—Application by middleman to have fair rent fixed against his landlord before removal of caretaker—Occupation by middleman—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), s. 57—Land Law (Ireland) Act, 1887 (50 & 51 Vict., c. 33), s. 7.

** A tenant, having sub-let to her own landlord, brought an action and recovered judgment for possession for non-payment of rent, and served the eviction notices under sec. 7*

of the Land Law (Ireland) Act, 1887, a herd of the sub-tenant being at the time in occupation. More than a month after service, but before the period for redemption had expired, and without proceeding to obtain physical possession of the lands, the tenant served an originating notice to have a fair rent fixed in respect of her tenancy.

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Held, that the tenant was, at the date of the originating notice, in occupation of the lands.

BEWLEY, J.—The tenant Julia Garnett held these lands under a lease of the 10th November, 1831, for a term of three lives, at the yearly rent of £37 10s. It appears that by an agreement in writing, dated 11th February, 1878, she re-let the entire holding to her landlord, Mr. W. S. Garnett, for her own term, at a rent of £91 3s. 4d. The landlord, however, failed to pay this rent, and, having fallen into arrear, the tenant was compelled to bring an ejectment against her landlord in the month of July, 1891, and recovered Judgment for possession on 2nd November, 1891. The notices prescribed by the Land Act of 1887 were duly served on the 27th November, 1891, and thereupon, within the language of section 7 of the Act, Mr. W. S. Garnett became a caretaker. An originating notice to fix a fair rent was then served by Julia Garnett on the 16th January, 1892, and subsequently possession of the holding was obtained under a magistrate's order. On the hearing before us it was contended that, at the time of the service of the originating notice, Mrs. Julia Garnett was not in occupation. The language of the statute, however, is that "upon the determination of the tenancy by the service of such notice as aforesaid, every person upon whom such notice is served shall thereupon be deemed to be a person put into possession as a caretaker, and the enactments of the Landlord and Tenant Law Amendment Act (Ireland), 1860, relating to persons put into possession of lands by permission of the owner as caretakers, shall apply." If a writ of *Habere* had been

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executed, and Mr. W. S. Garnett had been put into possession as caretaker, his occupation would be the occupation of Mrs. Julia Garnett; and, in the events which have actually happened, I think he must be treated as if he had been actually appointed a caretaker, and cannot be allowed as landlord to set up his own occupation as ousting the right of the tenant to have a fair rent fixed. The old rent was £37 10s., and the judicial rent £37, which we confirm.—*Ir. R.*, vol. ii., 41, 1894.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
1892.

(Before LORD ASHBOURNE, C., PORTER, M.R., and
FITZGIBBON, L.J.)

Boyle v. Foster.

Lease—Mill—Substantial part of the premises not agricultural—Proviso, that if Mill burnt, rent should be reduced—Part of the demised premises outside the provisions of the Land Law (Ireland) Act, 1881.

By lease dated the 28th February, 1866, 62 acres and 27 perches of land, Irish measure, were demised for thirty-one years, subject to the annual rent of £260. The premises were described as "all that farm of land, with the dwelling-house and out-offices, mill, and kilns thereon, known as the mill-holding." The mill itself and the mill-race occupied but a small part of the holding, and the rest was agricultural land. The lease contained a covenant against alienation, and a proviso enabling the lessor to resume possession of portion of the premises known as the "Calf Park." The lease

contained several clauses relating to the maintenance and working of the mill, including a covenant by the lessee to thresh all oats and other grain for the lessor at 6d. a barrel, and a proviso that in case the mill was burnt, the rent should be reduced by £80 a-year until it was restored by the lessor.

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The Sub-Commission (Kane, Q.C., A.L.C.) dismissed the tenant's application. The Land Commission reversed the decision.

Held (reversing the decision of the Land Commission), that a substantial part of the premises being outside the provisions of the Land Law (Ireland) Act, a fair rent could not be fixed for the holding. (*Leonard v. St. Leger Barry, Butterly v. Carroll, Mooney v. Wilcox*, referred to.)

LORD ASHBOURNE, C.—This case comes before us on appeal from the Land Commission, who decided that the holding was within the provisions of the Land Act, and that the tenant was entitled to serve an originating notice, and get a fair rent fixed. In arriving at that conclusion, they overruled the decision of the Sub-Commission, who, after visiting and seeing the farm, came to the conclusion that the case was out of the Land Act, on the ground that a substantial part of the holding was not agricultural or pastoral, or partly agricultural and partly pastoral, and was, therefore, not within the Land Law Act. Ashbourne, C.

The construction of the lease of the 28th February, 1866, is important. The lease was made between Frederick John Foster and Launcelot Coulter; and Mr. Foster demised to Coulter "all that farm, premises, and land, with the dwelling-house and offices, mills and kilns thereon, known as the mill holding, being part of the townland of Ballymascanlan, in the barony of Lower Dundalk, County of Louth, together with the mill-race and water therein and flowing through the same," containing in the whole 62 acres, Irish, at the rent of £260

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payable half-yearly. It contains covenants of importance. It was a demise of premises which are described on the face of the lease as a mill-holding ; and there are clauses to be found in the lease which show that the parties never lost sight of that description all through the lease. There was a proviso that the tenant should grind corn for his landlord at 6d. a barrel. There was a power of surrender every five years, and there was also a power reserved to the landlord to resume possession of the " Calf Park ;" a circumstance, in my opinion, of considerable importance. There was also a proviso that if the mill was burnt, the rent should be reduced by £80 a-year ; and there was further an exclusion of trees from the demise, there being a substantial number of them. We were told, though it is not in the lease, that the landlord insured the mill, and paid the premiums on the policy, so that in the event of fire it will be restored. The case, therefore, shows that while there were 62 acres, Irish, in the holding, let at £260 a-year, it was borne in mind by the parties that it was a mill-holding ; and if it ceased to be used as a mill, the lessee was to get a reduction of nearly one-third of the rent. The tenant, availing himself of his assumed rights under the Land Act, served an originating notice to fix a fair rent. The case was heard before a Sub-Commission, presided over by Mr. Kane ; and the Lay Commissioners, having inspected the farm, decided that it was not agricultural or pastoral in its character, or partly agricultural and partly pastoral. We have not the precise terms of the order of Mr. Kane before us, and we do not know them exactly. He may have thought it was not within the Land Act, as being not agricultural or pastoral in its character, or partly agricultural and partly pastoral ; or he may have arrived at the conclusion that, as a large part of the holding consisted of mill premises, a substantial portion was withdrawn from the jurisdiction of the Land Commission, and, part of it being withdrawn,

the whole was withdrawn, according to the decisions which have been pronounced in former cases.

The case came before the Land Commission, and Bewley, J., came to the conclusion that the order of the Sub-Commission was erroneous, and he sent it back to have a fair rent fixed. Bewley, J., in his clear and able Judgment, which we have before us, said that the Land Commission had availed themselves of the power which they possess of sending down two valutors to value the property ; and he based his Judgment on that valuation, which we have had the advantage of reading. There is no dispute as to the authorities in the case. It was decided long ago, shortly after the Land Act of 1881 was passed, in the case of *Leonard v. St. Leger Barry* (1), that where a substantial part of the demise was demesne land, the whole was taken out of the jurisdiction of the Court. In that case there were 60 acres in the holding, of which 21 acres were demesne, and O'Hagan, J., in giving judgment, said :—" Demesne lands are excluded from the Act, shut out from the operation altogether ; and, therefore, if demesne lands are incorporated with other lands which are not demesne lands, inasmuch as we are precluded from any judicial action as regards a portion of the holding, we are of opinion that we are precluded from action altogether, otherwise our general action would lead to illegal action. We might not take that course if the demise was very small ; but having here 21 acres unquestionable old demesne lands, and remaining such in its character, we are of opinion that we are shut out from dealing with the holding." Now, the reasoning of O'Hagan, J., there has been acted on uniformly in every case, and the reasoning applies equally to anything which excludes a substantial portion of the demise from the jurisdiction of the Court. It might be excluded from other circumstances, as, *e. g.*, that the land had been let for temporary convenience, or that the land

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was not agricultural or pastoral, or partly agricultural and partly pastoral.

Then came *Butterly v. Carroll* (1), in this Court, the Court being composed of Lord Morris, and FitzGibbon and Barry, L.JJ.; and that was a case of letting for temporary convenience. It was a small holding at Phibsborough, and 8 acres, 2 roods, 31 perches of land were demised for thirty-one years, and there was a power reserved to the landlord to take up 4 acres for building purposes; and the Court came to the conclusion, acting on the reasoning of O'Hagan, J., that the portion capable of being taken up for building necessarily led to the exclusion of the whole. We considered the question last year in *Mooney v. Willcocks* (2), and on the special facts of that case we arrived at the conclusion that a fair rent might be fixed; but we did not at all interfere with the principle of the decision of O'Hagan, J., in *Leonard v. St. Leger Barry* (3). Therefore, I take it that it is now settled that if part of the holding is withdrawn because it is demesne land, or let for temporary convenience or for other adequate cause, a fair rent cannot be fixed. Here a very substantial part of the holding is outside the Land Law Act, when on the face of the lease one-third of the whole—the valuers assess it at 22.4, and, taking even their reduced figures, a very substantial part—was excluded from the jurisdiction of the Court as not being agricultural or pastoral in its character. In reference to the statement that the mill was not intended for the use of the holding, but of the neighbourhood, obviously, even on their own showing, it is impossible to work in their valuation with the lease, because the lease, on its construction, which must apply, had measured the value of the mill as about one-third of the whole. The valuers say, however, that the fair rent should be £156, and the value of the mill was put at £40; but it was not competent for them to do that, because the value of the

mill was fixed at £80 by the parties themselves in the event of the mill being burnt down. They have no power, under the circumstances, to vary it, and if the mill was burnt, it would leave £80 to be deducted from the rent. I am, on the whole, of opinion that the mill is not ancillary to the rest of the holding, and that it cannot be regarded as a small portion of the value of the holding, but as being a very substantial part of the letting, which on the face of the lease itself is withdrawn from the jurisdiction, as plainly not intended to be regarded as agricultural or pastoral.

I am of opinion that the order of the Land Commission cannot be sustained, and the appeal must be allowed, with costs.

Porter, M.R., and FitzGibbon, L.J., concurred.—L.R.I., xxx., 63. See *M'Conaghy v. Gledstones*.

NOTE.—Section 5, sub-section 2, of the Land Law (Ireland) Act, 1896, provides that where a distinct portion of the property held under one demise is not agricultural, and the Court consider that that part is not the substantial part, the Court may, if of opinion that the separation of the property into two parts will not diminish the value of the landlord's interest therein, direct that that part shall henceforth be treated as a separate holding; . . . and the Court may fix a fair rent on the remainder.

The section is not retrospective as regards holdings in respect of which a judicial rent has been fixed prior to the 15th August, 1896 (sub-section 4).

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SUPREME COURT OF JUDICATURE.

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1895.COURT OF APPEAL.

(Before WALKER, C., FITZGIBBON and BARRY, L.JJ.)

Irwin v. Goodlate.*Land Law (Ireland) Act, 1881—Present tenancy—
Alteration of area and rent—Mill-holding.*

This was an appeal from a decision of the Land Commission. The holding is situate in the County Monaghan, and the landlord contended a fair rent could not be fixed, on the ground that the premises were used as a mill-holding, and that the tenant was a future tenant, there having been since the passing of the Act of 1881 an alteration in the size of the holding and the rent of the land. The Sub-Commission (Greer, A.L.C.) fixed the fair rent at £80. The Land Commission further reduced the rent to £70. From the decision of the Land Commission the landlord appealed.

Held, by the Land Commission (Bewley, J.) that whatever use had been made of the mill, it had been a strictly agricultural use, and as an adjunct to the farm. The area of the holding and the rent had been reduced since the passing of the Land Law (Ireland) Act, 1881; but they could not consider that this was not a holding in which a tenancy existed at the time of the passing of the Act of 1881.

The Court unanimously affirmed the decision of the Land Commission, and dismissed the appeal with costs.

[Not reported.]

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
1895.

(Before WALKER, C., PORTER, M.R., and BARRY, L.J.)

M^cConaghy v. Gledstanos.

Where in the facts of the case it appears that a mill demised on a holding otherwise within the Land Acts, does not form a substantial rent-producing factor in the demise, the existence of the mill will not prevent the tenant fixing a fair rent.

The Sub-Commission (Greer, A.L.C.) fixed a fair rent. The Land Commission reversed the decision, and dismissed the originating notice. The Court of Appeal affirmed the decision of the Sub-Commission with costs.

WALKER, C.—In this case the Chief Land Commissioners dismissed the tenant's originating notice, on the ground that the land was let as a mill-holding, and that, therefore, the case was governed by *Boyle v. Foster*, ante (30 L. R. I., 623 ; 27 I. L. T. & L. S. J., 9), and *Murdock v. Parkes* (not reported); both cases decided in this Court. The premises here were formerly demised by a lease dated January 3rd, 1839, which grouped together two parcels of land in this way: "All that and those, the farm and lands of Tullydonnell, containing 39 acres, or thereabouts ; and all that and those, the corn- and flax-mills, and the machinery and the mill land of Tullydonnell." This lease contained a covenant by the lessee that he was to keep in repair the corn-mill, consisting of double gearing, &c. The lease was made in consideration of a fine of £560, and the rent reserved was £103. Then on March 8th, 1856, a new lease was made, which is the lease referred to in the originating notice ; and it

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purports to be made in consideration of the surrender of the former lease, which had not then expired, and by it there is a demise to the lessee, not of two denominations calling one a mill-holding, but of "all that and those parts of the lands of Tullydonnell"—that is, simply calling it "lands"—containing 54 acres—that is, the sum of the denominations demised by the former lease—"together with the corn- and flax-mill and machinery thereof;" and the rent reserved by that letting is the sum of £70 a-year, instead of the large rent that was before reserved on the land and buildings. The proof of this appears not only from the figures, but also from the evidence given before the Land Commission by the landlord's valuer, who valued the land at the rent of £64 7s. 9d., and the judicial rent was fixed at £58 10s. It is clear, therefore, that the rent reserved by the lease was an agricultural rent only, and that no rent was fixed on the mills. It would seem that for a time the lessee under that lease, David M'Conaghy, worked, or tried to work, the corn-mill; but how far the work was devoted to either mill separately does not appear. A flax-mill would, of course, be more natural to an agricultural holding than a corn-mill. I conclude, as a fact, that the mill was not a substantial portion of the demise on which rent was fixed in 1856.

I have no doubt that a holding may, as a whole, be agricultural in its character, though there is a mill or open quarry or some other subject on it, which, if taken as a separate entity, is not agricultural, unless it be perhaps like tolls or something in the nature of an incorporeal hereditament, out of which rent is made to issue as a separate rent-producing factor. That would bring it within *Wall v. Eyre* (27 I. L. T. R., 87). Further, it appears from the Ordnance map that there was a dwelling-house on the larger denomination of 39 acres. There was also some kind of mill-house on the other denomination, which had been called the "mill-holding."

The Chief Commission based their Judgment on the two cases of *Boyle v. Foster* and *Murdock v. Parkes*. The facts of these two cases were clear and plain. In *Boyle v. Foster* the lease contained a demise of 62 acres, 28 perches (Irish). The rent was £260. It was a demise of a mill-holding; £80 was taken as the value of the rent attaching to the mill. The landlord insured the mill. There was a covenant that if the mill was burned the rent would be abated by £80 a-year. For these reasons, and the reasons given in Lord Justice FitzGibbon's Judgment in that case—that is, if the mill was burnt down after the fair rent was fixed, and if you struck off £80 a-year as the covenant provided, you would extinguish the rent—I would say it was impossible in the state of facts there to fix a fair rent; and, further, it was on the face of it, on the whole, a holding non-agricultural in its character. FitzGibbon, L.J., takes care in his Judgment to point out that a holding may be agricultural in its character, though there is a mill upon it; that is pre-eminently the case where it is a flax-mill. Then, *Murdock v. Parkes* was a letting of 19 acres only, and the rent was £50. There was a covenant by the tenant to insure the mill for £500. Having regard to the rent for that small acreage, and the whole frame of the lease, I don't think anybody who read that case could come to any other conclusion than that it was a mill-letting.

Putting to myself the test which I proposed—viz., is the character of this holding, taken as a whole, agricultural? and assuming, as I do, that it may be so, though there is a mill upon it, and having regard to the special facts, I do not think the mill was treated here as a substantial portion at all of the demise, or as a factor upon which rent was measured in 1856, and that, therefore, this holding may be treated as agricultural in its character, although there is a mill on it which was certainly not worked for some years before 1874, when

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it fell into entire disuse. Therefore, I think that *Boyle v. Foster* and *Murdock v. Parkes* do not rule this case, that the finding of the Sub-Commission was right, and that the finding of the Chief Commission should be reversed, and the case remitted to them to proceed on the originating notice.

Porter, M.R. PORTER, M.R.—I am of the same opinion. I regret that the case was presented before the Chief Commission and here without any full or accurate information as to the mill or mills, and we are accordingly left very much to speculate about them and their value. One was a corn-mill, the other was a scutch-mill; the latter fell into disuse, but was altered, and subsequently used for the purpose of threshing, and may be left out of the case, for if it stood alone, it could hardly be said that by its being on the holding a substantial portion of the holding would be shown to be a mill-holding. As to the corn-mill the evidence was somewhat loose. At first I was in doubt if it was used at all after the lease of 1856; but it does appear to have been used after that date, but how or to what extent is not made plain. Having regard to the circumstances which the Lord Chancellor has pointed out—the acreage, the past history and the present of the holding—were it not for one matter—viz., the covenant in the lease of 1856 to keep the mill and machinery in repair—there could be very little difficulty in the way of the appellant. There were two holdings prior to 1839—one, 15 acres, 2 roods, upon which the mill premises stood, called the mill holding. In 1839 this holding and one much larger, containing 30 acres, purely agricultural, were thrown into one, and a bulk rent of £103 fixed on the entire, subject to a fine of £650, which was paid. A new lease was taken in 1856; the rent was reduced to £70, the acreage being 70 statute acres; and there is nothing in the description of the premises to indicate that the mill formed any substantial part of the letting. The lessee

is described as a farmer. There is, however, the covenant to repair, and it must receive its legal operation. But apparently it was not much dwelt upon by the parties, for it was copied bodily out of the lease of 1839. When the case came before the Sub-Commission, they regarded it as an agricultural holding, and fixed the fair rent at £58 14s. The evidence before them was less conflicting in its character than is usual in cases like this. Some of the witnesses valued at £64, and some at £58. Comparing the rent fixed by the Sub-Commission and the value as sworn to before them with the reduced rent fixed in 1856, it seems to me that the rent of £70 was taken as an agricultural rent, and that no part of it was fixed in reference to the mill. Mr. Richards relied upon *Boyle v. Foster*. But in that case the agreement between the parties plainly showed that they regarded the mill as a substantial portion of the holding; and for that reason that case does not appear to me to apply to the case before us now; and I think that, notwithstanding the existence of the incorporated covenant in the lease of 1856, by which the lessee is bound to keep the mill in repair, the holding was taken by agreement among the parties as and at a rent suitable to an agricultural holding, and an agricultural holding only.

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BARRY, L.J.—I have great difficulty in this case, but, on the whole, I concur with the Judgments of the Lord Chancellor and the Master of the Rolls. On the facts there is a clear distinction between this holding and those in *Boyle v. Foster*, and in *Murdock v. Parkes*. Having regard to the peculiar facts of the case, so fully referred to by the Lord Chancellor and the Master of the Rolls, and basing my Judgment entirely upon them, I concur in the Judgment pronounced. I think we meet the merits of this case by holding that the mill was an inappreciable part of the premises demised.—
I. L. T. R., xxix., 37.

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NOTE.—Section 5, sub-section 2, of the Land Law (Ireland) Act, 1896, provides that where a distinct portion of the property held under one demise is not agricultural or pastoral, and the Court consider that that part is not the substantial part, the Court may, if of opinion that the separation of the property into two parts will not diminish the value of the landlord's interest therein, direct that that part shall henceforth be treated as a separate holding; and the Court may fix a fair rent on the remainder. The section is not retrospective as regards holdings in respect of which a judicial rent has been fixed prior to the 15th August, 1896. (Sub-section 4.)

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July 26,
1895.

SUB-COMMISSION.

(Before GREER, A.L.C.)

Matson v. Woodhouse.

Mill-Holding—So described in Lease.

GREER, A.L.C.—The landlord, through his solicitor, Mr. Robert Wilson, contended that this was a mill-holding. It is held under lease dated 2nd April, 1858, and the rent reserved thereunder is £25. In the demise the holding is thus described :—"All that and those, the mill of Carrowkeel, with the land attached, 22 acres, 5 perches." Prior to the lease the tenant was in occupation of a portion of the holding, and from the evidence it would appear that there was then upon it an old corn-mill, and the buildings of two flax-mills which had been burned down. At the time of the expiration of the lease the landlord advanced to the tenant a sum

of £25, to be expended in repairing the flax-mills and erecting six stocks in them, and also £50 towards repairing the corn-mill, in respect of which he paid £2 10s. per annum from 1859 to 1871, and he subsequently, in the year 1859, got four acres and a-half of additional land, and the rent was then made £26 13s. 6d. In 1871 the rent was reduced to £20, and in 1886 it was further reduced to £18. The tenant expended the £50, with other moneys, in erecting a kiln, a new mill-wheel, &c. He stated that the increase in his rent from £23 4s. 3d. to £27 13s. 6d. represented interest instalments to repay the advance of £50 in twenty years, whilst Mr. Wilson contended that it was made in respect of the additional four and a-half acres which was added to his holding. How that may be it is difficult to determine, as there was no documentary evidence offered in the case that would assist the Court. The lease is an ordinary lease, with the usual covenants, and contains a covenant against alienation. Strange to say, although the holding contained 22 acres and 5 perches, at the time of its execution, it is silent as to the acreable contents of the farm. In support of his contention, Mr. Wilson referred me to the reported case of *M'Conaghy v. Gledstones, ante* (I. L. Reports, 1895, 443). This was an application from the same county (Donegal), and in its leading features is peculiarly identical with the present case. There there had been an existing tenancy, and the tenant was induced to take a new lease of the holding in the year 1856. On that holding there was a corn- and flax-mill, and the lease contained a similar covenant against alienation. In that case, however, there was one element that favoured the landlord's contention, and which is absent here—namely a covenant on the part of the tenant to keep the mill buildings insured. Here there is no such covenant. These applications, as I have frequently observed, cannot be decided upon any abstract principle of law.

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Both the law and the facts must be carefully considered, and each case governed by its own peculiar circumstances. Now, what have we admitted as the common case of both parties in this application? That the holding prior to the date of the lease was an ordinary agricultural holding, with corn- and flax-mills upon it, and the rent (judging by its amount) was what might then be regarded as the ordinary agricultural rent of the holding. That the mills were out of repair, and the landlord desiring, as we may fairly assume, to have them repaired for the use and benefit of his other tenants, encouraged the tenant to undertake their renovation, and advanced him two sums of £50 and £25 to assist him in doing so. That arrangement, so far as we can ascertain, was come to in the year 1859, when the rent was raised to a sum of £27 13s. 6d., which the tenant continued to pay down to the year 1871, when it was, as I have already stated, reduced to £20. That these small corn-mills have been rapidly declining in value, and falling into disuse, is a matter of public notoriety. The whole system of local corn-milling has from various economic causes undergone a complete change; and whilst such an industry was some years ago regarded as a paying one, and was carried on to the great convenience of the farmers of the surrounding district, now it has become unprofitable, and in most cases can no longer be regarded as a rent-producing factor. I have been referred to the reported case of *Boyle v. Foster*, which is fully dealt with in the Judgment in *M'Conaghy v. Gledstones*. In that case the mill was a substantial part of the holding, representing £80 of the rent; in this case there is no such important element, as the entire poor-law valuation of the buildings upon the farm, the mills included, is only £11, and what the value of them was at the time of the execution of the lease, can only be conjectured. The corn-mill has ceased to be an element of value in the

rent, and we are of opinion that this holding is an agricultural holding. The water-power is the landlord's, and my colleagues, in estimating the fair rent, have taken its value into account. We fix the judicial rent at £15 10s.

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July 26,
1895.

LAND COMMISSION.

(Before BEWLEY, J., WRENCH and FITZGERALD, Q.C.,
Commissioners.)

Land Com.
December 19,
1895.

Nevin v. Montgomery.

*Resumption of Rent (Ireland) Act, 1891—Scutch-mills—
Fee-farm grant—Peculiar covenants.*

BEWLEY, J.—In this case two questions of importance and difficulty had arisen. In the first place, it was contended on behalf of the landlord that the holding, or a substantial part of it, was not agricultural or pastoral; and, in the next place, it was argued that the tenant could not be deemed in occupation of the holding, portion of it having been sub-let. The holding contained exactly 15 Irish acres, and was held under fee-farm grant dated 25th February, 1860. Upon the holding there was a flax scutch-mill, worked partly by water-power and partly by a steam-engine. The water-power was supplied by an artificial mill-race of a mile in length, and there was a tail-race of a quarter of a mile in length, which carried the water back to the stream from which the supply of water was derived for the mill. There were also upon the holding the tenant's residence and four or five cottages, four of these being for the mill-workers. As the existence of a scutch-mill upon the farm did not necessarily deprive it of its

Land Com. agricultural character, it was important in this case to
December 19, consider the origin of the letting and the purposes for
1895. which the letting was made. The fee-farm grant that
he had already referred to was made under the pro-
visions of the Renewable Leasehold Conversion Act,
Nevin in substitution of a lease for lives renewable for ever, on
v. the 18th January, 1808, made to the predecessors in
Montgomery. title of the present tenant, and it showed clearly the
circumstances under which the letting was made.
Bewley, J. Having read the recital of the lease, which states that
the 15 acres were demised to James Nevin for the pur-
pose of encouraging him to make still further improve-
ments in connection with the carrying on of a branch of
the linen manufacture, his Lordship said that these 15
acres of land were demised to the lessees, together with
the full and free use of the water then running to the
flax-mill, and held for a certain rent, during the exist-
ence of two lives, at the stipulated rent of £32 8s. 4d.,
and the lease contained a covenant that the lessees
should within five years lay out the sum of £12 an
acre on the holding in erecting houses for the purpose
of carrying on the linen manufacture, or some manufac-
ture in which linen yarn was the principal material.
That lease was executed in pursuance of a statute by
which holdings not exceeding 15 acres could be demised
for that purpose, if not less than £10 an acre were spent
in erecting proper buildings for carrying on some branch
of the linen manufacture. It appeared from the state-
ments in that lease there was already a flax-mill on the
premises. It was subsequently improved, if not rebuilt,
and several workers' cottages were erected, and it was
in reference to those cottages that the second question
had been raised. Naturally, those cottages were sub-let
from time to time to persons employed in the mill.
The mill was not a large one; it contained only six
stocks. The water-power was apparently deficient at
times, and the tenant erected a steam-engine some years

ago, which was used when the water was not sufficient. There was a circular-saw and a corn-crushing machine, which were occasionally used, and during the season of the year (from March until August) this flax-mill was in constant employment. There were at least ten workers engaged in the mill during that time.

Land Com.
December 18,
1895.

Nevin
v.
Montgomery

Bewley, J.

Under these circumstances the first question they had to consider was whether this was in substance a letting of a farm with a mill on it or whether the letting was of a non-agricultural character. It appeared to the Court, on the facts of the case, coupled with the terms of the lease, that the original letting was made not for the purposes of agriculture, but for the purposes of manufacture in connection with the linen trade. In arriving at that conclusion, they were influenced to some extent by the smallness of the holding. It was not to be supposed that they were laying down any general proposition in this case; but they were of opinion that this holding of only 7 acres, having regard to subsequent usages, was not let for agricultural purposes. That being so, the order fixing the fair rent must be discharged, and the originating notice dismissed. For the purposes of this case it was not necessary to decide the second question about sub-letting; but if it were necessary, they would say that the positive direction to erect suitable houses seemed to imply a consent to allow those cottages to be erected. However, on the first ground they were of opinion that the order for fixing the fair rent could not stand.

[Not reported.]

SUPREME COURT OF JUDICATURE.

Appeal.
April 17,
1891.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., O'BRIEN, C.J., and
FITZGIBBON, L.J.)

Bradley v. Johnstone.

The holding was in two townlands on either side of the river Mourne, and consisted of a farm of land containing $12\frac{1}{2}$ acres in the townland of Ballycoleman, about one mile from Strabane, and six small houses and buildings in the town of Strabane. Prior to Bradley taking the holding, the previous tenant, named Bell, lived in the house on the farm, had his offices there, and had some of the houses let to cottiers; he was a farmer. Bradley purchased the interest of Bell in the holding for a sum of £70, and obtained a lease of the premises for thirty-one years, bearing date the 23rd March, 1864, from James Johnston to Neal Bradley, at a rent of £45. Bradley was a flax-merchant in Strabane, and did not live on the premises, but set the houses on weekly rents to tenants. Prior to obtaining the lease Bradley asked the landlord for a lease of the land without the houses; but the landlord refused. The lease contained a covenant against alienation. Two of the houses were let at 2s. 6d. a-week, and four of them at 1s. a-week. The houses were in the town of Strabane, and were not occupied by labourers in the employment of the lessee. On the 14th October, 1887, the lessee served notice to fix a fair rent. On the 28th October, 1888, the Sub-Commission dismissed the lessee's application, upon the ground that the holding was neither agricultural nor pastoral, nor partly agricultural and partly pastoral. The lessee having appealed, the case was heard before

the Land Commission on the 25th November, 1890, when the appeal was dismissed.

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April 17,
1891.

The Court of Appeal subsequently, and on the 17th April, 1891, affirmed the decision of the Land Commission and Sub-Commission, and dismissed the appeal, on the ground that a substantial portion of the premises demised was neither agricultural nor pastoral.—L.R.I., xxx., 632.

Bradley
v.
Johnstone.

LAND COMMISSION.

(Before BEWLEY, J., FITZGERALD, Q.C., and O'BRIEN, Commissioners.)

Land Com.

Looby v. Jones.

The County Court Judge fixed a fair rent. The Land Commissioners (O'Brien dissenting) reversed the decision, and dismissed the originating notice.

BEWLEY, J.—The cottage in this case consists of a labourer's cottage, with a piece of land attached, containing about 3 roods, which piece of land was described by the County Court Judge's valuer as a cabbage garden, and the description given of it by the Court valuer was a labourer's plot; and the question they had to consider was whether a labourer's cottage, with a cabbage garden attached, was a holding upon which a fair rent should be fixed. It seems to me and to Mr. Fitzgerald that the case comes within a numerous class of cases in which the house is the principal subject-matter of the letting, and the land, or the cabbage garden, in this case is ancillary to the house.

Bewley, J.

The order fixing a fair rent is discharged, and the originating notice dismissed.

[Not reported.]

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
November,
1892.

(Before WALKER, C., O'BRIEN, C.J., BARRY and FITZ-
GIBBON, L.JJ.)

Crookshank v. Law.

Land Law (Ireland) Act, 1881—Fair rent—Non-agricultural Holding—Temporary Convenience—Onus probandi.

The tenant, Crookshank, a solicitor practising in the locality, held under an agreement of April 26, 1878, at a rent of £10 per annum. The measurement was 3 acres and 39 perches, and the land adjoined the messuage and residence of the tenant, about one mile from Portrush, Co. Antrim, to which, at the date of the letting, was attached a holding in fee, measuring over 6 acres. The tenant, at the time he entered into negotiations with the landlord, told the landlord that he wanted the land in question to prevent certain parties coming there. On the 28th April, 1888, the tenant served notice to fix a fair rent, and the County Court Judge (Overend, Q.C.) dismissed the notice, on the ground that the letting was not within the meaning of the Land Law (Ireland) Act, 1881. The tenant appealed to the Land Commission, and on the 16th July, 1891, the Land Commission reversed the decision of the County Court Judge, and fixed a fair rent, with consent of the tenant, at £10 a-year, the rent which the tenant was already paying under the agreement.

In the agreement the tenant was to cultivate the land in a husbandlike manner. The land being situate near Portrush—a town which is extending in the direction of the district in which the land is situate—it was

suitable for villa purposes, and this characteristic was mentioned at the time of the agreement.

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1892.

WALKER, C.—It would be unfortunate if the tenant in this case were allowed to fix a fair rent. The land was taken to carry out a special purpose, and the evidence shows that, in making this letting, an agricultural motive was not for a moment in the minds of the parties. This cannot be held to mean agricultural holding.

Crookshank
v.
Law.

O'BRIEN, C.J.—An ordinary person, not a lawyer, would never say that this was an agricultural take, or within the class of holdings to which the Land Act was intended to be applied. The tenant took this land for the benefit of his residence.

O'Brien, C.J.

FITZGIBBON, L.J.—I should wish to make only two observations upon this case. The class of cases nearest to this case is that of residential holdings. The words "residential holdings" do not occur in the Act at all, but are arrived at by working out the negative of the terms "agricultural or pastoral," or "partly agricultural and partly pastoral," as the object of the letting. This is the negative of that object, and it is not agricultural or pastoral. The other observation I should like to make is as to the value; it is proved that £10 a-year is not a pastoral or agricultural value of the land, and that, notwithstanding the proximity of the land to the town, £10 a-year is not the value to anyone except Mr. Crookshank. The reason why he was willing to pay that amount was wholly separate from any idea of its being agricultural or pastoral. He must abide by the agreement, and he is not entitled to cut down the rent from £10 to £5. The tenant himself says that £10 a-year is in excess of the true value. What does he pay the extra £5 for? Clearly it was for the additional convenience. The Commissioners, in fixing, with his consent, a fair rent at £10, did what they had no right to do, thus subordinating the primary object of

FitzGibbon,
L.J.

Appeal,
November 26,
1892.

the Act—viz., fixing a fair rent upon the true value—to the secondary purpose of giving the tenant fixity of tenure, to which he was not entitled.

Barry, L.J., concurred.—I.L.T.R., xxvii., 2.

Land Com.
November 26,
1892.

LAND COMMISSION.

(Before BEWLEY, J., and LYNCH and WRENCH,
Commissioners.)

Allen v. Grogan.

Land Laws—Holding not agricultural or pastoral in its character, or partly agricultural or pastoral—Land Law (Ireland) Act, 1881, section 58—Demesne land.

The tenant was owner of the demesne of Slaney Park, from which the holding in question was divided by the high road. A handsome gateway, corresponding to the gateway of the demesne grounds opposite, was erected on the holding, and a belt of trees planted on it along the road; otherwise it was tilled in the usual way. The rent was over £5 an Irish acre.

Held, that the holding was not agricultural or pastoral in its character, or partly agricultural or pastoral, but had been taken to improve the appearance and add to the amenity of the demesne and residence of Slaney Park.

BEWLEY, J.—As Jurors, I and my colleague, Mr. Commissioner Wrench, find that the lands comprised in the lease of the 2nd October, 1812, were not taken by Dr. Grogan to make profit by farming, but to improve the appearance and add to the amenity of the demesne and residence of Slaney Park. Upon this

finding I have no difficulty in holding that the lands are not to be considered as agricultural or pastoral within the meaning of the Land Act of 1881. In a case of *Grace v. O'Connor* [unreported], which came before me and Mr. Commissioner Fitzgerald, at the hearing of fair rent appeals at Roscommon, on the 6th of May, 1891, it appeared that the tenant, who was a gentleman of large property, living in the mansion-house in the demesne of Mantua, took a piece of land containing about 18 statute acres, lying between his demesne and the public road, at a rent in excess of the ordinary agricultural rent; and having come to the conclusion on the evidence that the lands were not taken for any agricultural purpose, but as an adjunct to the demesne, and with a view to its greater convenience or enjoyment, we dismissed the originating notice of the tenant seeking to fix a fair rent. The application to redeem the rent reserved by the lease of the 2nd October, 1812, cannot be sustained, and the originating notice must be dismissed with costs, including the costs of the present appeal.—I.L.T.R., xxvii., 55.

Land Com.
November 26,
1892.

Allen
v.
Grogan.

Bewley, J.

SUB-COMMISSION.

(Before GREER, A.L.C.)

Sub-Com.
January,
1893.

Carr v. Vernon.

Application to fix a fair rent—Convent—Agricultural holding—Town-park—Land Law (Ireland) Act, 1881, section 58—Land Law (Ireland) Act, 1887, section 9.

Application to fix a fair rent by Mrs. Teresa Carr, the Lady Superioress of the Ursuline Convent of Sligo, a religious Society devoted to Christian charity and education. The holding, which consists of three fields,

Sub-Com.
January,
1893.

Carr
v.
Vernon.

measuring 10 acres, 3 roods, 12 perches, adjoins the convent, is within the municipal boundary of the town of Sligo, and is subject to town rates, which are paid by the tenant. It was taken some years ago by the ladies of the convent from the predecessor of the present landlord without the payment of a fine, and at the present rent of £42 5s. The lands have been cultivated in the ordinary way, the entire produce of grass, hay, and vegetables being consumed in the convent. There was no evidence of improvements.

Greer, A.L.C.

GREER, A.L.C.—I have considered the evidence given on this application, and I have arrived at the conclusion that the holding is not, and never could have been, regarded as an agricultural holding within the meaning of the Land Law (Ireland) Act, 1881. The lands were originally let, not to an ordinary farmer for agricultural purposes, but to a religious sisterhood, who have residing within the walls of the convent some thirty-five or forty lady boarders; and the entire produce of the holding is consumed by the residents of this educational and charitable institution. The tenant is thus the producer and consumer, and lands so occupied must be regarded as bearing an increased value over and above the ordinary letting value of land occupied as an ordinary farm. The rent at which they were taken—£4 per statute acre—affords a striking presumption that they possessed an enhanced value; and this was further supported by the evidence of the landlord, who stated that he got £10 an acre for adjoining lands, and that butchers and others in Sligo would give him from £4 to £6 per acre for lands in the immediate neighbourhood. Under all the circumstances of this case, I do not entertain a doubt that this holding was originally taken solely for the accommodation of the residents of the convent, and not for ordinary agricultural purposes; and, that being so, the application must be dismissed.—I.L.T., xxvii., 64.

SUB-COMMISSION.

(Before GREER, A.L.C.)

Sub-Com.
April,
1893.**Lyle v. Greer.**

Redemption of Rent (Ireland) Act, 1891—Lease for 200 years—Non-agricultural—Purpose of letting.

Area, 24 acres, 3 roods, 9 perches; valuation, £28 18s.; rent, £69 9s.

GREER, A.L.C.—This holding is held under lease, dated 13th July, 1872, made by the late Samuel M'Curdy Greer, father of the present owner, to the Rev. John Lyle, of Knockintern. It is a lease for 200 years, from the 29th September, 1871, and the application comes before the Court under the Redemption of Rent Act, 1891. Prior to the execution of the lease Mr. Lyle was tenant to Mr. Samuel M'C. Greer of 10 acres, 2 roods, 27 perches of the holding, at a yearly rent of £8 7s. 2d.; and when he procured the lease, the area of the holding was increased to 24 acres, 3 roods, 9 perches, and the rent was made £69 9s. The additional land thus acquired by Mr. Lyle lies immediately between his demesne and residence of Knockintern, and the 10 acres, 2 roods, 27 perches which he formerly held as tenant from year to year. The lease is in the ordinary form, and I cannot find anything on the face of it that discloses the object which the tenant had in procuring it. But two letters addressed by the tenant's brother to the landlord in September and October, 1868, and which led up to the perfecting of that demise, afford distinct evidence of the motive which actuated Mr. Lyle, and accounts for his agreeing to pay such an advanced rent—viz., to enable him to plant a belt of trees, and otherwise preserve the privacy of his residence, and thus make it an

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adjunct of his demesne. In this view of the case my colleagues, after a careful inspection of the premises, fully concur. That being so, and having regard to the recent decisions of the Land Commission in the cases of *Allen v. Grogan* and *Collins v. Finnucane*, 26 I.L.T. & S.J., 646, we are bound to dismiss the application.

[Not reported.]

See *Allen v. Grogan*, *ante*.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
Apr. 17, 18, 23,
1894.

(Before WALKER, C., SIR PETER O'BRIEN, C.J.,
and FITZGIBBON and BARRY, L.JJ.)

Pratt v. Gormanston.

Devesne land—Tenancy from year to year—Land used as demesne—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49).

A holding consisted of 35 acres, which had been held by the tenant and his predecessors in title, under a yearly tenancy from the landlord and his predecessors in title, for a great number of years. The tenant and his predecessors owned freehold lands to the extent of about 1,000 acres, including a mansion-house and demesne, which were adjacent to the holding in question. The holding had been used for non-agricultural purposes, planted, grazed, and treated as ornamental or accommodation land in connection with the mansion-house.

Held (by Walker, C., and Barry, L.J.), that the land was neither agricultural nor pastoral *in its character*, and that a fair rent could not be fixed.

Held (by Sir P. O'Brien, C.J., and FitzGibbon, L.J.), that the land was demesne land, and also was not agricultural and pastoral *in its character*.

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Magner v. Hawkes (32 L.R.I., 285) commented on.

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Appeal from the Land Commission.

The facts of the case are reported (1894), 2 I.R., 279.

Walker, C.

WALKER, C.—In this case the originating notice has been dismissed on the ground that the lands in question were demesne lands, and Mr. Justice Bewley considered that in so deciding he was following and bound to follow the case of *Magner v. Hawkes* (2) in this Court. It is quite true that there are observations in the Judgment of some of the learned Judges in that case which go far to justify that view of Mr. Justice Bewley; but in the case of *Magner v. Hawkes* (1) the contest was between a landlord, asserting that the lands were demesne lands of his, and a tenant, who insisted that they were not. In the present case the lands could never, under any circumstances, be the demesne lands of Lord Gormanston, and if they were surrendered or evicted, they would, *ipso facto*, lose any such imputed character. I think the question is a most important one, whether land can be "demesne land" within the meaning of the excepting clause of the Act of 1881, unless when there is a landlord, who claims them as his demesne, and asserts his right to resume them as such, without the incident of a fair rent being fixed upon them. I cannot find any case which has gone so far; as I think this case can be decided without laying down any direct principle, I express no opinion upon it.

What, however, we do find is that the present holding has been, by an ancestor of the tenant, at a date lost in antiquity, made part of the Cabra demesne. The demesne embraces holdings of different tenures, a large part held in fee, and some for lesser terms, and the present held from year to year. The Cabra demesne is a mansion-house, with attached lands, all

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ornamentally planted, constituting coverts for game, and, as a whole subject, I think it would be impossible to treat it as an agricultural or pastoral holding. By the acts of the tenant's predecessors in title the holding was thrown into and incorporated with this subject. It was taken for that purpose, and treated for it. It is an island of grass, of 19 acres, surrounded by 14 acres of planting; and as I think the tenant has incorporated it with the whole, I do not think he can now separate it, and say it is an agricultural or pastoral holding, to be separately treated from that to which he has indisso- lably united it by his acts. The case of *Allen v. Grogan, ante* (2), has a strong bearing on the present case, and would have been sufficient in the Court below for the determination of this case.

We are, of course, not bound by the decision ; but its principles are, I think, applicable to the present, and I am of opinion that the order appealed from should be affirmed, on the grounds that on all the facts proved the holding is not agricultural or pastoral in its character.

Barry, L.J., in a lengthened Judgment, concurred.—
Irish Reports, vol. ii., 564.

O'Brien, C.J.

SIR PETER O'BRIEN, C.J.—I concur in thinking that the Judgment of the Land Commission should be affirmed. I do so on the ground that these lands were demesne lands, and come within the exception of the Act of Parliament. There can be no doubt that these lands were incorporated with the demesne of Mr. Pratt ; they were made part and parcel of his demesne, and form an integral part of it. But are they demesne lands within the meaning of the exception of the Act of Parliament? The words of the Act of Parliament are "any demesne land." Beyond all question they form part and parcel of the demesne ; and the words of the Act of Parliament are "any demesne land." I can find nothing to limit the generality of these words,

either in the language of the Act of Parliament or in the policy of the Legislature.

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As to the circumstances under which the contract was made—Mr. Pratt, or his predecessors in title, take these lands. They comprise some 35 statute acres, and of that about 14 acres were planted. He, or rather his predecessors, make these large plantations, and bring them into line with the coverts in the demesne. Whether they do so for the amenity of the estate, or for shooting or hunting, does not appear; but they bring them into line with the coverts in the demesne. In my judgment, it was not the policy of the Legislature that persons who get land and use it in this way are to be relieved against a contract which they deliberately entered into; the words of the Act, which are my guide, do not warrant it.

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O'Brien, C.J.

It has been said that demesne lands may be demesne lands subjectively; that they may be demesne *quoad* A and *quoad* B, but not *quoad* C. For my own part, I am of opinion that, once it was decided, as it was decided in *Magner v. Hawkes* (1), that no particular kind of tenure is essential to constitute demesne land, the question is:—What, having regard to all the circumstances, is the concrete thing? Is it demesne land? And once it is, it is a demesne against all the world, and not only against A and B. If a place is a flower-garden *quoad* A and B, it is a flower-garden *quoad* all the world. This, amongst other points, and notably that with reference to tenure, was what was decided by the Lord Chief Baron and myself in *Magner v. Hawkes* (1). It is said that this part of the Chief Baron's Judgment was extra-judicial. So far as his Judgment was concerned, it was clearly not; it was the *ratio decidendi*, the very ground of his decision. Here is what he says:—"The main ground relied upon in support of this narrower construction is that a lease, such as that of 1752, for 990 years, negatives any

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intention by the lessor to resume occupation ; and it is said that there are some expressions in the Judgments in *Griffin v. Taylor* (2), which indicate that if the representatives of the lessor evicted the lessee, and resumed possession, the lands could not be demesne as against them, and that, therefore, they cannot be demesne against anyone. I entirely concur in so much of this reasoning as insists that lands cannot be 'demesne,' within the meaning of the Act, subjectively, and that if the holding is not 'demesne' *quoad* everyone, it cannot be demesne at all ; but I contest the prior step in the argument. The right to have a fair rent fixed is a right given to the tenant in occupation of such lands as, at the passing of the Act, answered a particular description ; and although, whether they answered that description, must usually depend upon the acts of particular persons, the lands are, according to the nature of those acts, either brought within or excluded from the Act, not *quoad* those particular persons, but as to *all* persons having estates therein. Of two tenants for short terms of years, holding under the one landlord, one may have sub-let parcel of his holding 'wholly or mainly for the purpose of pasture,' whilst the other may have let part of his holding without any such limited purpose. The head-landlord may not have done any act whatever in relation to either holding ; still, one sub-tenant may, and the other may not, have acquired rights under the Act against that head-landlord.

"So, too, of two tenants of a common head-landlord one may, and the other may not, have constituted his holding demesne, and then each may have sub-let. In my view in such a case the sub-tenant of one might have no right, and the sub-tenant of the other might have a right, under the Act against the common head-landlord. I hold, then, that in determining whether lands are demesne, we must work up from the occupier,

and consider the question as between him and his immediate landlord. If their relations are such that the lands are 'demesne' within the meaning of the Act, they are so, not as between them solely (as had been argued), but for all purposes, and so as to bind everyone."

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Nothing could be clearer than this language. It plainly demonstrates that, so far as the Lord Chief Baron's Judgment was concerned, it was not extrajudicial, it was the very groundwork of his Judgment. The proposition he affirmed was "demesne lands against all or none." I well remember that Mr. Healy argued the point at great length. No doubt, the question of tenure formed a main or principal feature of the discussion; but Mr. Healy asked, and persistently pressed, the question, Were the lands demesne lands in relation to Tonson, the head-landlord? I gave my answer to the question, and the Lord Chief Baron dealt with it with a minute elaboration. But suppose Mr. Pratt sub-let these lands, would they be demesne lands in the hands of the sub-tenant? I do not know whether that was denied or not. In my opinion, on the authority of *Magner v. Hawkes* (1), they would be, once they were incorporated by Mr. Pratt in his demesne, and not undemesned by him.

I am of opinion that the Judgment of Bewley, J., is right. I do not dissent from the ground of the decision of the Lord Chancellor founded on *Allen v. Grogan* (2). If I might venture to criticise the language of the Judgment in that case, I would say that the motive of the take as distinguished from the character and user of the thing taken was made too much the basis of the decision. I do not dissent from the view taken by the Lord Chancellor; but for the reasons I have assigned I think the Judgment of Mr. Justice Bewley is right.

FitzGibbon, L.J., concurred with O'Brien, C.J., in holding that the lands were demesne.—*Ir. Reps.*, ii., 557.

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1894.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before PALLES, C.B., & FITZGIBBON & BARRY, L.JJ.)

Perry v. Farley.

Agricultural or pastoral holding—Land Law (Ireland) Act, 1881, section 58, sub-section 1.

A holding consisted of 1 acre, situate on the South Circular Road, Dublin, within the municipal boundary. It had formerly been held by the same tenant, along with another acre of land; but the latter portion had been taken by another person, who had let it out as a receptacle for dust and refuse. The holding had been used for agricultural purposes.

Held (reversing the decision of the Land Commission), that the holding was not one to which the Land Law (Ireland) Act, 1881, applied.

The holding originally consisted of about 2 acres, statute measure, which the tenant took about the year 1858 from one Coffey. It was situated on the South Circular Road of the City of Dublin, and the footpath in front of it was a concreted pathway, and there were gas-lamps along the road. It was within the municipal boundary, so far as taxation was concerned. About one hundred yards off stood the building known as the St. Patrick's Home for the Poor, and beyond that was the Royal Hospital of Kilmainham and the South Dublin Workhouse. The tenant lived at Crumlin, about a mile and a quarter away. Coffey, who was a middleman, holding under the Domville family, ceased to be a tenant, and about 1888 a man named Barrett was accepted as tenant of one-half of the holding by

the head-landlord. The entire rent for the 2 acres was originally £12. After half the holding was taken by Barrett, Perry's rent was reduced to £6 10s. Barrett had let out his acre as a receptacle for dust and refuse.

The Sub-Commissioners fixed a fair rent ; the Land Commission affirmed the decision, and the landlord appealed.

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Palles, C.B.

PALLES, C.B.—In the view which I take of this case, the only question which it is necessary to determine is whether the holding is one to which the Land Act of 1881 applies. This holding is not only situated within the municipal boundaries of the city of Dublin, but it abuts upon one of the streets, the South Circular Road, which is paved and lighted. Upon the same side of this street, both above and below the holding in question, but at certain distances from it, there are, and, as I understand the evidence, there were in 1881, inhabited buildings—the auxiliary workhouse upon the one hand, and buildings in Kilmainham upon the other. In extent the holding is an English acre, and it is of a form, as appears from the map and from the Assistant Commissioner's Report, suitable for the erection of such a house as would probably be built in such a locality. The holding adjoining it is used as a dust-heap ; but it appears that the period at which it was first so used was subsequent to 1881. For many years the holding has been used as a market-garden.

The Act does not apply to any holding which is not "agricultural or pastoral in its character, or partly agricultural and partly pastoral" (1). These words are identical with those in section 71 of the Landlord and Tenant Act of 1870, which is *in pari materia* with that of 1881. The Act of 1870 also contained in its 15th section a provision that compensation should not be payable under the previous sections in respect of town-parks, which are described in words identical with those in section 58, sub-section 2, of the later Act, and one of

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the characteristics of which is that it must bear an increased value as accommodation land "over and above the ordinary value of land occupied *as a farm*." Shortly after the passing of this Act it was determined by the special Court of Appeal constituted by it, in *Carr v. Nunn* (1), *post*, that the mere fact that its greater part was used for growing agricultural produce, or for the depasturing of cattle, did not necessarily bring the holding within the Act. The question there was in relation to a villa residence, consisting of a house and 8 acres of land attached, of which 6 acres formed a lawn, and the remainder, with the exception of half-an-acre, which was in tillage, was under the house and garden. Lord O'Hagan, in giving the unanimous Judgment of the Court, said: "We do not mean to determine that 8 acres might not constitute an agricultural or pastoral holding, or that, under certain circumstances, a much smaller piece of land, consisting of 4, 3, or even 2 acres, might not be properly considered as such. We have to regard the nature and extent of the property, the object for which the tenancy commenced, and the use which the tenant had made of the tenement, in order to determine the nature and character of the holding." During the argument of the case Mr. Baron Dowse put the question thus to counsel: "You contend that the real question is whether it is a villa residence with accommodation land, or a *farm* with a house on it."

Again, in *Doyle v. Campbell* (2), *post*, the same question arose in reference to a holding which consisted of 25 Irish acres, 10 of which were under the house, offices, gardens, and ornamental grounds, and the remaining 15 acres of which were regularly fenced fields, used exclusively for pasture.

These two cases, which since have been uniformly followed, excluded residential holdings from the operation of the Act of 1870, by ascertaining from the entire Act the meaning in the view of the Legislature of the

expression "agricultural or pastoral in its character;" and in substance decided that a holding, to be within the Act, should be a farm. This construction was settled and well known when the Act of 1881 was passed. That Act excludes from its operation tenancies which are described in the same words as those which, to the knowledge of the Legislature, had been thus previously construed. The Act by section 58 is not to apply to "tenancies in any holding (1) which is not agricultural or pastoral in its character, or partly agricultural or partly pastoral;" by sub-section 2 of the same section there is an exclusion of town-parks, which are described in the same words as are contained in section 15 of the earlier Act. We are, therefore, by the ordinary rules of construction, bound to construe the words "a holding which is agricultural or pastoral in its character" in the sense which had been judicially attributed to the similar words in the previous Act—*i.e.*, as "a farm."

I proceed, therefore, to consider the question of pure fact: whether, under the circumstances of this particular case, the holding can properly be described as a farm?

I take, first, the fact that it is within the municipal boundary of the City of Dublin, and that the landlord, by reason thereof, is liable to pay city rates. I do not think that this circumstance is conclusive. There may be, and I believe there are, in many parts of Ireland, municipal towns, the boundaries of which extend far out into that which, in ordinary language, would be deemed "country," as distinguished from "town;" and I am not to be taken as determining that a holding within such a district might not be within the Act of 1881. But this particular holding is not only within the municipal limits, but is one which, having regard to its situation as already stated, must, in my opinion, be held, as a matter of fact, to be in "town," irrespective altogether of municipal limits, and using that word, as I have already used it, in contradistinction to "country." It is distinctly

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urban and not rural. It is, in fact, a town building-plot, which, pending a demand for it as such, was used as a market-garden. Can such a holding with propriety be said to be a farm? As to the effect of its locality upon this question, I deem it material to refer to another of the characteristics of town-parks, as prescribed by section 58, sub-section 2. They must be "adjoining or *near* to any city or town;" words which *prima facie* do not include holdings *within* a city or town, although, if such latter holdings would otherwise have been within the Act, there would have been the same, if not much graver, reasons for excluding them than could apply to holdings which only adjoined or were near to, but not within, the town or city.

This, I think, indicates that it was not present to the mind of the Legislature that there could be a farm within a "city or town," using these words as meaning, not the entire district within the municipal limits, but the portion which, in fact, answers the description of "city or town," as distinguished from "country," the urban, as distinguished from the rural district. At present it is not necessary that I should determine that no holding situated within this district could be one to which the Act applied; but I hold, without any doubt, that the locality of the holding being within the urban district is one of the several circumstances which the Court is bound to take into consideration in determining its character. Accordingly, following the decisions that the Act relates solely to farms, and taking into consideration the urban locality of this holding, I hold that it cannot with propriety be deemed a farm, and that consequently it is one to which the Act does not apply.

As the Limerick Market cases have been referred to, I deem it right to say that I am not to be taken as expressing any opinion in reference to them. They were, I assume, determined on their own facts, and these facts are not the same as those in the present case. But I

cannot hold that every market garden *is* of necessity a farm, although I agree that there *may be* market gardens of such extent, and used in such a way, as properly to come within that term.

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In my opinion the appeal should be allowed, and the originating notice dismissed with costs.

FitzGibbon and Barry, L.JJ., concurred.—I.R., ii., 579.

LAND COMMISSION.

Land Com.
December 20,
1896.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Robertson v. Duncannon.

BEWLEY, J.—The holding in this case, which was known as Annefield, contained a little over 115 statute acres, and was situate in the County of Kilkenny, about five miles from Carrick-on-Suir. It was demised to Mr. Patrick Robertson, the present tenant, by a lease dated 21st of February, 1881, the term being thirty years, at a yearly rent of £150. It was moved on behalf of the landlord, first, that the main object of the letting of the holding was for a residence, and that the holding thereof was excluded from the fair rent provisions of the Land Act by section 5, sub-section 1a, of the recent Land Act, or in the alternative that the holding was let for temporary convenience, or to meet a temporary necessity, either of the landlord or tenant, within the meaning of section 58, sub-section 7, of the Land Act of 1881. Mr. Robertson in the year 1879 was a retired merchant, living in the suburbs of London. One of his daughters was married to Mr. Mercer, a gentleman residing near Carrick-on-Suir; and in the course of a visit to his son-in-law,

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Mr. Robertson happened to see Annefield, and learned that it was to let. His Lordship discussed at length the circumstances under which the holding was let to the tenant by the late Lord Bessborough, who was then the landlord, and said the Court was of opinion that the holding was not let for temporary convenience. Coming to the main contention, which was founded on section 5, sub-section 1*a*, of the recent Land Act, which provided that the Land Acts did not apply to tenancies the main object of the letting of which was for a residence, it was frankly admitted by counsel for the landlord that the holding in this case could not be excluded as not being agricultural or pastoral; and that if it were to be excluded at all, it should be on the ground that the main object of the letting was for a residence. In his Lordship's opinion the provisions in the recent Land Act relied upon by the landlord were not intended to create any new ground of exception, nor to exclude from the rent-fixing provisions of the Land Acts any holding that had not been excluded by the existing law. In his Lordship's opinion the holding was let to the tenant by Lord Bessborough as a farm, not merely and not mainly as a residence: and that neither by the provisions of the recent Act or any other Land Act was the tenant precluded from having a fair rent fixed. The old rent was £150, the judicial rent £104 10s., and they now fixed the judicial rent at £113.

SUPREME COURT OF JUDICATURE.

(Before LORD ASHBOURNE, C., PALLES, C.B., and
FITZGIBBON and BARRY, L.JJ.)

Appeal.
June 11, 12, 13
1890.

M^rMaster v. Jackson and Betty.

*Tenant bonâ fide in occupation of the entire holding—
Sub-letting of small portion by the landlord prior to
the creation of the tenancy—Assignment of the rever-
sion—Subsequent change of tenancy—Proviso per-
mitting sub-letting.*

On the 22nd of November, 1841, W. executed to D. a lease of 58 acres of the lands of C. for the life of W., and thirty-one years from the gale day preceding her death, at a rent of £130 10s. On the 20th April, 1844, the Misses D. executed to D. a lease of 29 acres of the lands of C. for thirty-one years; and on the 4th December, 1869, this last-named lease was renewed for sixty years, at a rent of £79 15s. Both leases contained a provision enabling the lessee to assign or sub-let without the consent of the landlord. Prior to the making of either lease one George B. was in possession of 5 acres of the land as tenant from year to year, at a rent of £9. George B. died before 1866, and after his death his eldest son Henry B. paid the rent, and was treated as a tenant. Henry died in 1887, and then Richard B., his brother, succeeded as tenant, and paid the rent; but no personal representative was ever raised to either George or Henry.

The estate of W. and D., the landlords in the original leases of 1841 and 1844, became vested in J. and B.; and the interest of D., the lessee, became vested in M. as to 29 acres, as tenant under the lease of the 4th Decem-

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ber, 1869, and as to the 58 acres, as overholding tenant after expiry of the lease of 22nd November, 1841. In November, 1886, M. served notice to fix a fair rent of the 58 acres; and in October, 1887, he served notice under the Land Law Act, 1887, to fix a fair rent of the 29 acres.

The Sub-Commission (Greer, A.L.C.) dismissed the tenant's application. The Land Commission reversed the decision. The Court of Appeal confirmed the decision of the Land Commission, and

Held, (1) that George B. having died more than 20 years before the notice to fix the fair rent, the tenancy from year to year vested in him was extinguished; (2) that the tenancy from year to year vested in Henry B. must be deemed to be a new sub-letting, with consent of the landlord, owing to the proviso in the original leases; and that M. was consequently *bond fide* in occupation of his holding.

Ashbourne, C.

LORD ASHBOURNE, C.—The case before us is one of importance; and the Court has, at the request of the Land Commission, somewhat expedited the hearing, as it was stated that it was brought as a test case which would rule several others. But we are of opinion that the point on which the Land Commission have apparently desired a decision is not one upon which it is necessary for the Court to give an opinion, because the case is governed by the rules already settled by authority.

The farm in question consists of 87 acres, which, many years ago, became divisible into two parts, one-third comprising 29 acres, and two-thirds the remaining 58 acres. All these parts, making altogether 87 acres, became vested in M' Master, who held the two-thirds as tenant from year to year, and the 29 acres under a lease of 1869. In 1886 he served notice to fix a fair rent under the Act of 1887 as to the one-third which he held under lease. The defence taken by the landlord

was, that the tenant was not entitled to have a fair rent fixed, because he was not *bonâ fide* in occupation of the entire holding. It appears that a man named George Brown was in possession of a tenancy from year to year, created by the head-landlord, in five acres, portion of this entire holding, and he was so in possession before 1841. This George Brown died at a date which has not been proved; but it was more than twenty years before 1886, some time between 1860 and 1870. When he died, there was no personal representative raised to him, nor for twenty years after his death. But his widow and five children remained in possession, and one of his sons, Henry, was accepted as tenant by the landlord. No administration was taken out by him to his father, and he obtained from the landlord receipts in his own name for the rent. Henry died in 1887, and Richard Brown, his next brother, then went into possession in a similar way, paying the rent, and getting receipts in his own name, but not taking out any administration. If George Brown's tenancy were now represented by Richard Brown, the sub-letting would not have been made by the tenant with the consent of the landlord; and the question would have arisen whether the tenant could, under the circumstances, be regarded as being in occupation of the farm. But if Henry Brown, the son of George, was accepted, and made a tenant by M'Master, then there was a sub-letting made by the tenant with the consent of the landlord, and the case falls within *M'Carthy v. Swanton* (1), and is governed by it. The Land Law Act, 1881, section 57, has been constantly referred to in the course of the argument. The definition of a tenant given there is a person occupying land under a contract of tenancy, and includes the successors in title of a tenant. The governing word in that part of the section is "occupying." It then proceeds:—"Where the tenant sub-lets part of his holding with the consent of his land-

Appeal.
June 11, 12, 13,
1890.

M'Master
v.
Jackson and
Betty.

Ashbourne, C.

Appeal.
June 11, 12, 13,
1890.

M'Master
v.
Jackson and
Betty.

Ashbourne, C.

lord, he shall, notwithstanding such sub-letting, be deemed, for the purposes of this Act, to be still in occupation of the holding." The governing word of that clause is "occupation." This short explanatory passage shows what is not to prevent the tenant being in occupation; and if the tenant sub-lets a portion of the holding with the consent of the landlord, the landlord is not to be allowed to raise the objection against the tenant that he is not in occupation of the entire holding.

If, then, we hold that there was a sub-letting by the tenant with the consent of the landlord, the point raised by the Land Commission does not arise, and that is my opinion. I think Henry Brown was in possession of a new tenancy created by M'Master. If I am right in describing Henry as a new tenant to M'Master, then this is the case of an occupying tenant who has sub-let to a new tenant. Is it with the consent of the landlord? It obviously is; for the lease itself contained permission to sub-let. The sub-letting made by the tenant must be deemed to be with the consent of the landlord.

I am of opinion that the Land Commission are right in the conclusion at which they have arrived, but on different reasons from those given by them; and I hold that Henry Brown was a new tenant, and that the case is governed by *M'Carthy v. Swanton* (1).

Palles, C.B., and FitzGibbon and Barry, L.JJ., concurred.—L.R.I., xxviii., 176.

LAND COMMISSION.

Land Com.
January 11,
1892.(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)**Cowell v. Buchanan.**

Redemption of Rent (Ireland) Act 1891 (54 & 55 Vict., c. 57), sections 1, 3—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), section 57—Application for Redemption of rent—Bonâ fide occupation—Assignee of reversion of part of lands.

If a landlord makes a lease of lands, partly in his own possession, and partly in the hands of a yearly tenant, the lessee cannot be deemed in occupation of the part in the yearly tenant, and, therefore, is not in *bonâ fide* occupation of the holding, so as to entitle him to the benefits of the Redemption of Rent (Ireland) Act, 1891.—L.R.I., xxx., 375.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Case stated by
Land Com.
1894.(Before LORD ASHBOURNE, C., FITZGIBBON, BARRY,
and NASH, L.JJ.)**Nagle v. Galbraith.**

Where, through the result of an arrangement between the parties, a portion of a leasehold has been surrendered or re-demised to the landlord, the tenant can be treated as in bonâ fide possession of the holding within 44 & 45 Vict., c. 49, section 21, and entitled to have a judicial rent fixed.

Case stated by
Land Com.
1894.

Case stated by the Land Commission. The facts were shortly as follows :—

Nagle
v.
Galbraith.

By lease of 1st May, 1825, F. and M. demised to James Nagle the lands of Peterswell, containing 46 acres, plantation measure, for three lives, at the rent of £1, Irish, per acre. The total rent thus amounted to £43 7s. 8d., present currency. On the 15th September, 1838, Martin Nagle, in whom the lessee's interest had become vested, sub-demised the "Chapel Field," containing 2 roods, for the term of three lives. By conveyance from the Landed Estates Court of the 29th April, 1854, Galbraith, the present landlord, became entitled to the lessor's interest. The schedule of the conveyance described Martin Nagle as holding 74 acres, 1 rood, at £42 14s., and also as holding 3 roods at 13s. 8d. In 1856 the landlord purchased the sub-lessee's interest in the "Chapel Field" lease of 1838. By lease of the 20th November, 1856, Martin Nagle demised to the landlord, Galbraith, 17 acres, 2 roods, 37 perches, plantation measure, for three lives, at the rent of £16 6s. 7d., being 18s. 5d. per acre. Subsequent to this the mode of dealing between the parties was that the tenant should pay the difference between the two rents for which cross-receipts were given. On the 6th January, 1883, the three leases of 1825, 1838, and 1856 determined by the death of the last *cestui que vie*. At this date the interest of the lessee in the lease of 1825 was vested in Mary and Sabina Nagle. On 22nd March, 1883, the tenant's originating notice was served, stating the area as 47 acres and 27 perches, and the rent as £43 7s. 8d. On 3rd April, 1883, the landlord served originating notice to apply for authority to resume for the purpose of a home farm. This notice stated the acreage as 29 acres, 1 rood, 30 perches, and the rent as £27 1s. The Sub-Commission amended these notices by stating the acreage in both notices as 47 acres and 27 perches, and the rent as £27 1s., and held that the landlord was

entitled to resume possession upon paying the sum of £150. Case stated by
Land Com.
1894.

The case was re-heard before the Land Commission on the 28th May, 1886, when it was held that the landlord did not wish to resume possession for the *bond fide* purpose of a home farm, and that the tenants were in *bond fide* occupation of their holding, inasmuch as the deed of the 20th November, 1856, if it was an assignment, must be held to have operated as a merger.

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v.
Galbraith.

Upon appeal Lord Ashbourne, C., held that the case must be decided upon its peculiar facts and circumstances, and that the decision of the Court below must be affirmed, and the appeal dismissed. He had, however, arrived at this conclusion with some doubt. It was a case of shrinkage.

FitzGibbon, L.J., dissented. He was unable to bring the tenant within the 21st section upon the previous decisions of the Court. The Court could never deal with section 21 upon any consideration that they were depriving the tenant of benefit or the landlord of advantage. *Bond fide* occupation must be something real, and not merely colourable. The acreage had been changed, and the rent changed. His Lordship referred to *McCarthy v. Swanton*, 18 I.L.T.R., 85, 14 L.R.I., 365.

FitzGibbon,
L.J.

Barry, L.J., concurred with the Lord Chancellor. He considered that the tenant was in actual occupation of the holding, as reduced in area by the transaction of the surrender at the reduced or apportioned rent.—I.L.T.R., xxv., 33.

Barry, L.J.

Land Com.
December 24,
1896.

LAND COMMISSION.

(Before ROSS, J., and FITZGERALD, Q.C., Commissioner.)

Young v. Guinness.

ROSS, J.—In this matter we have been asked to state a case for the Court of Appeal on the question of whether the tenant's occupation interest ought to be taken into consideration in fixing the fair rent. We find it wholly impossible to do so in the present case. The landlord's valuer did not take it into consideration in arriving at his figures. Neither did the tenant's valuer, who stated, in a reply to a question, that he did not understand it. We must wait for some case in which the question is properly raised. We have no right to take the opinion of the Court of Appeal on questions not distinctly raised by the evidence.

Land Com.
February,
1891.

LAND COMMISSION.

(Before BEWLEY, J., & FITZGERALD, Q.C., Commissr.)

St. George v. St. George and Brown.

Land Law (Ireland) Acts, 1884 and 1887—Practice Amendment of originating notice—Leaseholder under misapprehension serving notice in Form 27 under Act of 1881, allowed to amend to Form 79 under Act of 1887, notwithstanding section 5 of Act of 1887—Appeal—Discretion of Court.

Where a leaseholder, believing that, as his lease was unstamped and undated, he was a yearly tenant, had served an originating notice to have a fair rent fixed in

Form 27 as a yearly tenant under the Land Law (Ireland) Act, 1881, but, on finding out his mistake, had applied for leave to amend his notice into one under the Land Law (Ireland) Act, 1887, he was allowed to so amend, notwithstanding section 5 of the Land Law (Ireland) Act, 1887, under which the judicial rent runs from the gale day next after service of the originating notice. *O'Neill and another v. Willis* (23 I.L.T.R., 97) distinguished.

Land Com.
February,
1891.

St. George
v.
St. George and
Brown.

Leave to appeal to Her Majesty's Court of Appeal from an order allowing such an amendment will not be granted, as the making of such an order is in the discretion of the Court.—I.L.T.R., xxv., 42.

LAND COMMISSION.

Land Com.
February,
1892.

(Before BEWLEY, J., & FITZGERALD, Q.C., & WRENCH,
Commissioners.)

L. Hempenstall's Estate.

Originating notice—Signature by tenant—Power to amend
Rules, December, 1883, r. 36.

The landlord appealed in a number of cases, on the ground that the originating notices had not been signed in accordance with Rule 36 of Rules of December, 1883. The originating notices had not, in fact, been signed at all. The point had not been raised before the Sub-Commissioners who heard the case.

The Court held that the omission of the signature was a material omission, but that it was waived by the landlord not making the objection in the Court below; also, that the landlord was not prejudiced by the omission, and that the Chief Commissioner can, if necessary, amend the originating notice by inserting the name of the tenant.—I.L.T., xxvi., 80.

Land Com.
November,
1896.

LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Dunne v. Nettles.

(And twenty-nine other cases.)

Land Laws—Application to fix rents payable during a second statutory term—Originating notice within the last twelve months of the first statutory term or premature—Date from which term runs when rent is fixed by agreement and declaration, and when by agreement with a reinstated tenant—Land Law (Ireland) Act, 1881, sections 8, 20 (2).

When an agreement and declaration entered into under section 8 of the Land Act of 1881 have been filed by the Court, the statutory term runs from the rent day next succeeding the filing, and not from any earlier date.

When a tenant is reinstated under Land Law (Ireland) Act, 1881, section 20 (2), and at the same time an agreement of the rent to be paid is made, such agreement need not be in writing; nor if in writing need it be filed; hence in such cases a judicial term may come into existence at the date of the agreement.

Applications to the Court to fix fair rents, payable during a second statutory term. The question arising in each case was as to whether the application was premature.

The facts are stated in the Judgment.

Healy, for the tenant in the first case, contended that the date of the beginning of the statutory term was the date of the agreement between the parties fixing the amount of the rent.

BEWLEY, J.—In thirty-five cases listed for hearing before us on the same day originating notices were served by the tenants of applications to the Court to fix the fair rents of their respective holdings, payable during a second statutory term; and in each case a question arose as to whether the application was not premature. In four cases no attempt was made to justify the institution of the proceedings, and the remaining thirty-one cases have now to be dealt with. Section 8, sub-section 8, of the Land Law (Ireland) Act, 1881, provides that during the currency of a statutory term an application to determine a judicial rent shall not be made except during the last twelve months of the current statutory term; and the question we have had to consider in each case is whether the day upon which the originating notice was served was or was not within the last twelve months of the first statutory term. If it was prior to the last twelve months, there is no jurisdiction whatever to entertain the application to fix a fair rent, and the originating notice must necessarily be dismissed.

In the majority of these cases the judicial rent was fixed by an agreement and declaration entered into and filed in Court under the provisions of section 8 (6) of the Land Act of 1881 and the rules made thereunder; and the right to maintain the present application depends on the date from which the first statutory term ran.

In four cases on the estate of Lord Templemore agreements and declarations in the ordinary form, dated the 12th July, 1882, were filed by the Land Commission on the 25th October, 1882; but, according to the affidavits of the tenants, the fair rent fixed by the agreements was the rent paid in each case as from the 1st November, 1881. Under these circumstances it has been argued on behalf of the tenants that the statutory term must be treated as running from the 1st November, 1881. But, as I have already stated, the statute fixes the period from which the statutory term is to run, and

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the fact that the landlord for some time prior to the fixing of the judicial rent agreed to accept a rent equal in amount to that ultimately fixed cannot alter the commencement of the statutory term.

In three cases on the estate of John M'Birney a different and important question arises. The tenants of these holdings, it is stated, were evicted immediately after the passing of the Land Act of 1881, but were reinstated a short time afterwards as present tenants at rents then agreed upon between them and the landlord. [Reads s. 20, sub-s. 2, of the Act of 1881.]

Rule 100 of the Land Commission Rules of the 1st October, 1881, provided that where the landlord and tenant agree what is the then fair rent of the holding pursuant to section 8, sub-section 6, or section 20, sub-section 2, of the Act of 1881, they should enter into an agreement and declaration which might be in Form No. 33; and Rule 102 provided that the declaration and agreement should, within one month after the date thereof, be lodged with the Clerk of the Peace of the county or with the Land Commission, as the case might be; and that the Clerk of the Peace or Land Commission should file the same at the expiration of three months from the lodgment thereof, if no notice of objection to the filing thereof should have been in the meantime received. Agreements and declarations in the prescribed form were entered into by the landlord and tenants in these three cases in the months of February and April, 1882, and were duly lodged with the Clerk of the Peace of the County of Monaghan, and subsequently filed in Court. For the reasons fully stated by me at Cork, in the case of *M'Carthy v. Warrington* (29 I.L.T.R., 149), and at Belfast on the 17th December, 1895, in the case of *Graham v. M'Naghten*, it is not, in my opinion, essential that an agreement as to the rent of the holding on the reinstatement of a tenant under section 20, sub-section 2, should be in writing, or,

if in writing, should be filed in the manner prescribed by the rules. There are, therefore, grounds for contending that, in the cases referred to, if the facts stated are established in evidence, a judicial rent came into existence at the dates of the agreements, and not at the dates at which they were filed. If this be so, the applications would not be premature, and under these circumstances I am of opinion that these three cases should proceed in the ordinary way.

In five cases the judicial rent was fixed by a Sub-Commission in the months of July or August, 1882, and as the cases were not recorded—*i.e.*, the applications were not made to the Court on the first occasion on which it sat—the judicial rent and statutory term ran from the 29th September, 1882, the rent-day next succeeding the order fixing the rent. But the originating notices to fix the judicial rent for the second statutory term were served in the month of August last, and the proceedings were, therefore, brought too soon.

The originating notices in all the cases, except the three on the estate of John M'Birney, must be dismissed on the ground that the applications were premature. In a large number of these cases the tenants are now in a position to serve originating notices to fix a fair rent for a second statutory term; and it is to be regretted that they did not wait for a short time longer before commencing proceedings.—I.L.T.R., xxx., 143.

Land Com.
November,
1896.

Dunne
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Nettles.

Bewley, J.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
April 27,
1882.

(Before LAW, C., MORRIS, C.J., and DEASY and FITZ-
GIBBON, L.JJ.)

Harper v. Davles.

A tenant from year to year held 172 acres of land under an agreement in writing, that he should not break up more than eight acres, and that all hay made on the farm should be consumed thereon; the lands were valued under the Acts relating to the valuation of property at an annual value of more than £50.

Held, that the holding was let to be used mainly for the purpose of pasture, and came within the exception in section 58, sub-section 3, of the Land Law (Ireland) Act, 1881.

Appeal from an order of the Court of the Land Commission, dated the 16th February, 1882, dismissing the originating notice of Thomas Harper, the tenant, to have a fair rent fixed of his holding.

The Judgment of the Court was delivered by Law, C. :—

It appears to us that this tenancy is one which falls within the terms of the exception in section 58, sub-section 3, of the Land Law (Ireland) Act, 1881, as being a holding which has been let mainly for the purpose of pasture. The contract of tenancy is embodied in a written instrument, dated the 13th April, 1865, whereby the lands were let to the appellant, subject to certain provisions, the most material of which, for our present inquiry, are as follows :—

After demising the lands of Naptown, containing about 172 statute acres, to be held from year to year at

a certain rent, the agreement proceeds thus :—" All the land that is not now under grass to be properly sown by the tenant, this present spring, with clover and hay-seed, with the exception of one field, which must be well and properly cleaned, and be put under green crop ; and also with the exception of the paddock lying to the south of the farmyard, and the field adjoining it to the south-east ;" describing the paddock and adjoining field as containing 8 acres. It then further provides that the field, which was to be cleaned and put under green crop the first year, should in the next season be laid down with clover and grass seed, whilst the 8 acres, consisting of the specified paddock and adjoining field, might be kept in tillage or laid down in grass at the tenant's option. The meaning of this would seem to be that all the farm was to be kept in grass, with the exception of the 8 acres just referred to. Subject to that exception, every field which was not already in grass the tenant bound himself to put into grass ; and it cannot therefore, be reasonably contended that when he had once done this, he was to be at liberty forthwith to break it up, and keep it in tillage if he pleased. That would be a very unnatural construction of the agreement, and inconsistent too with what is implied by the express permission to keep in tillage the 8 acres. The plain meaning of the agreement, as it seems to me, was that, except the specified 8 acres, all the farm was to be put into and kept in grass. But, then, it is argued that, even so, it does not follow that it was let to be used mainly for the purpose of pasture, and that if the contract admitted of the land in grass being all "meadowed" or used for the production of hay, the letting would not be one mainly for the purpose of pasture. The agreement, however, contains some further provisions, which, in my opinion, show that the use of the land for meadowing or hay-farming was not in the contemplation of the parties. It contains a

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clause in these terms :—"The tenant is not to remove or allow to be removed any hay from the said farm, with the exception of such portion of the hay crop of the year 1866 over and above what he may require for consumption on the farm." It then provides that if the tenant breaks up any of the land then in grass, or thereby agreed to be put under grass, he is to pay £7 an acre for the land so broken up. And, finally, in consideration of the tenant putting the land under grass, the landlord agrees to allow him £10 half-yearly for the first two years.

It is plain to us, on the language of this agreement, that the parties to it contemplated a letting mainly for the purpose of pasture and nothing else. It, no doubt, allowed of hay being made on the farm ; but as it did not permit that hay to be removed off the farm, the parties must be taken to have intended that only so much hay should be made as would be needful for supplementing the actual pasturage of the cattle on the farm. Speaking for myself, I think the test is not whether the landlord could or could not obtain an injunction against the tenant to prevent his breaking up any of the land that was in grass, though I have a strong opinion on that point too, but rather whether, on the whole of the written contract, the Court is satisfied that the use of the land for pasture was mainly what the parties had in view.

In the present case, however, we are all clearly of opinion that, having regard to the terms of this contract of tenancy, the holding was let to be used mainly for the purpose of pasture, and that the appeal should, therefore, be dismissed with costs.—L.R.I., xii. 23.

LAND COMMISSION.

Land Com.
1883.**Clynch v. Gore.**

O'HAGAN, J.—Since in this case the point was raised that the land was set to be used mainly for the purpose of grazing, the instrument under which it was set was before the Court, and in that the farm was distinctly termed a grazing farm. Although there was no restriction to a particular number of acres, and although meadowing was not excluded, yet still the definition of the farm itself—at the time when it was let to the tenant as a grazing farm, and that being done for the express purpose of defining it as a grazing farm to which the Act of 1870 should not apply—in the opinion of the Court, put the case outside the Act, and, therefore, the originating notice must be dismissed with costs.

[Not reported.]

LAND COMMISSION.

Land Com.
1883.**Masterson v. Nicholson.**

This case came before the Court on motion of the landlord that the originating notice to fix a fair rent might be struck out, on the ground that the farm was held for pasture. The farm, which is situate in the County Meath, contains 143 Irish acres. Griffith's valuation is £285 10s., and the rent £397 10s. The lands were held under an agreement of July 18th, 1877, by which the tenant agreed not to break up or meadow any part of the lands without the landlord's

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permission in writing, and would then only cultivate or meadow such part as might be specified in the permission.

O'HAGAN, J., in delivering the Judgment of the Court, said—To have to seek the landlord's permission for the ordinary and normal mode of user of the land, would seem a contract into which no sane man would enter. There must be some mode of making profit of the land without having to seek the landlord's permission ; and ploughing and meadowing being excluded by the contract, nothing remained but pasture. The contract imported, not in precise language, but as a necessary consequence, that the holding was mainly to be used for pasture ; and to this was to be added the obligation of consuming all hay and straw upon the premises. This obligation showed clearly that any meadowing was to be merely a circumscribed and secondary use of the land ; for plainly, no profit could be made by meadowing, if the tenant was not allowed to use the hay. The Court, being of the opinion that the holding was let mainly for the purpose of pasture, must grant the landlord's motion with costs.—MacDevitt, 156.

May 2, 4,
July 7,
1884.

HOUSE OF LORDS.

(Before the EARL OF SELBORNE, L.C., LORDS
BLACKBURN, WATSON, and FITZGERALD.)

Westropp v. Elligott.

*Holding let to be used mainly for the purpose of pasture—
Covenants—Restriction in lease as to tillage—Evi-
dence as to course of husbandry—Grass Farm.*

At the expiration on the 25th of March, 1882, of a lease dated the 16th day of July, 1861, the landlord

W. claimed possession, on the ground that the holding, which was valued at above £50 yearly, was let to be used wholly or mainly for the purpose of pasture within the meaning of section 58, sub-section 3, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49). The holding consisted of 123 acres, 3 roods, 25 perches, statute measure; and by the lease of 1861 the lessee E. covenanted that he would manage, till, and use the lands in a good and husbandlike manner in due and regular course of husbandry, so that the same might not be in any way injured or deteriorated; also that he would not, without the consent of the landlord in writing, break up or have in tillage or in course of tillage in any one year any greater quantity of the demised premises than 10 acres, plantation measure (equivalent to 16 acres and 7 perches, statute measure), to be selected from a certain portion of the premises stated in the lease to be then under tillage, and delineated on an annexed map. E. had previously held the lands under a lease from the Court of Chancery, dated the 27th day of February, 1852, for seven years, pending a cause. This lease also contained a covenant by him to manage and cultivate the premises in a proper and husbandlike manner; and not to commit or suffer wilful or voluntary waste; and not to break up or convert into tillage, under a penalty, more than 15 Irish acres, without restricting the quantity so permitted to be broken up to any particular part of the holding. Neither lease contained any other clauses relating to tillage. On the trial of an ejectment by W., he proved that at the execution of the lease of 1861 there were only about 15 acres in tillage; and that for the period he had known the lands, extending over forty years, they had always been used as a pasture farm. E. deposed that, while holding under the lease of 1852, he had broken up 15 acres each year, and that the portion so broken up extended over the entire farm; that he

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L.C.

frequently meadowed the lands, generally about 20 acres, and sometimes sold hay off the lands. He admitted that he used the farm as a dairy farm. No other evidence was given, and each side asked for a direction, without asking for any question to be left to the jury. The Judge, at the trial, directed a verdict for E.

Held (affirming the decisions of the Court of Appeal and Common Pleas Division), that the direction should be upheld.

THE EARL OF SELBORNE, L.C. (1).—In order to justify a reversal of that order, it must be made out that the land in question was “let to be used wholly or mainly for the purpose of pasture.” I entertain no doubt that “pasture” in this place means feeding cattle or other live stock upon the land. That is both the etymological sense of the word and its sense according to ordinary agricultural use. I think also that it is the sense in which other cognate words occur in other parts of the Irish Land Acts of 1870 and 1881. I do not think it is enough that the land should be shown to have been actually used, wholly or mainly, for this purpose, unless it was “let to be” so used, by which I understand that its use for that purpose must have been a matter of contract, express or implied, between the landlord and the tenant.

In the present case the contract between the landlord and the tenant is in writing; and unless it can be collected from the terms of that written contract (read in the light of extrinsic facts, properly appearing by the evidence) that any use of the greater part of this land for any other purpose than that of grazing or depasturage was, expressly or impliedly, excluded, I think it is not within the exception contained in section 58, subsection 3, of the Irish Land Act of 1881. I use the term “excluded” rather than “prohibited,” in order to avoid any unnecessary question as to what the consequences of any other use by the tenant might be, or as

to the media of proof by which the exclusion of other modes of use might be established.

The statement of the plaintiff in his evidence, "that since he had known the lands they had always been used as a pasture farm," cannot, in my opinion, be received for the purpose of adding anything to the terms of the written contract which might not otherwise, upon ordinary principles of construction, have been ascertained to be part of those terms, unless, indeed, the mere fact of use in a particular manner for a considerable period of time is enough to show that any other use would be impracticable, or would be contrary to the covenant "to manage, till, and use the lands in a good and husbandlike manner, and in due and regular course of good husbandry, so that the same might not be in any way injured or deteriorated." But it appears to me to be impossible without more to arrive at that conclusion. The words of the covenant are not less applicable in themselves to arable or meadow than to pasture land; and if the quality and value of the land might have been maintained by proper manurance or otherwise—if hay or other crops were taken off the whole or the greater part of them (say, in alternate years)—they would not be injured or deteriorated by that mode of use. There is nothing to show that in the present instance this might not have been possible. That the whole of the lands had been since 1852 (though only a small part of them at any one time) under plough, was proved by the defendant. This alone is enough to prove that they were not "ancient" pasture, so as to make any other use of them waste. If the plaintiff's statement, that the lands had always (within his memory) "been used as a pasture farm," was not enough to show that it was implied in the contract that they would continue to be so used, still less was the defendant's statement that he had used the farm as a dairy farm. I do not mean to say—as

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appears to have been said in *O'Brien v. White* (1)—that it might not be enough to show that the lands were of such a nature that they *could not*, in the ordinary course of things, be used, except for pasture. I incline to think that this, if it were shown, would be enough. But in this case nothing of that kind appears. The evidence not only did not show that the lands were from any cause incapable in their own nature of being properly used, in the ordinary course of things, otherwise than for pasture, but it was proved, as I have already said, that, at one time or another since 1852, every part of them had been under tillage; and it was also proved that the defendant had “frequently meadowed different portions of the lands.”

We are brought, therefore, to the inquiry whether, from the express terms of the lease (having such regard as may be proper to all these extrinsic facts), it can be collected that the land was “let to be used wholly or mainly for the purpose of pasture.” There is certainly no express contract to that effect. There is nothing in the description of the parcels, or elsewhere, from which it can be inferred that this was regarded as a condition or quality of the holding. The only covenant (besides that for good husbandry, to which I have already adverted) which bears upon the subject is one which limits the quantity of the land to be broken up or had in tillage without the landlord’s consent to 10 out of 123 acres, to be selected from certain specified parts of the farm. This excludes tillage; but it does not exclude the use of all or any part of the grass land for meadow or hay purposes, as long and as often as such use may be consistent with good husbandry, and may not involve injury or deterioration. That use would not, in my opinion, be “for the purpose of pasture.” There is no covenant that any hay which may be made from the land shall be consumed on the farm; if there had been, I should have agreed that this would be within the fair

meaning of "pasture." But as long as the covenant for good husbandry is not broken, there is nothing that I can see to prevent all the grass grown upon the farm in any year from being turned into hay and sold (if a market can be found for it) off the farm; nor is there anything even to show that there would have been no market.

I think, for these reasons, that this holding has not been brought within the exception contained in subsection 3 of section 58, and that the appeal ought to be dismissed with costs.

LORD BLACKBURN.—My Lords, this is an appeal against an order of the Court of Appeal (in Ireland) affirming an order of the Common Pleas Division, discharging a conditional order to change the verdict entered for the defendant at the trial before Mr. Justice Lawson into a verdict for the plaintiff, or that the verdict should be set aside, and a new trial be granted on the ground of misdirection.

The action was by a landlord against his tenant to recover possession of a farm let for a term of twenty-one years, which expired on the 25th of March, 1882. It was not disputed that, if the Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), applied, the verdict was properly directed for the defendant. The question really was, whether this holding was brought within the exception in the 58th section—"that this Act shall not apply to . . . (3rd) any holding let to be used wholly or mainly for the purpose of pasture," and valued at an annual value of not less than £50. The valuation in this case exceeded £50. . . . I think the true guide as to what is to show the purpose for which the letting is, is very well and clearly expressed by Pothier. Though the effect of the purpose being shown may be different in the foreign law from that which it has in English law, yet the reason and sense of the thing is very often to be found in the writings of the great Roman and foreign jurists.

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Pothier says—*Du Contrat de Louage*, No. 22 and 23 (I translate, slightly abbreviating, from the 3rd volume of *Œuvres de Pothier*, par M. Dupin, p. 240)—“No. 22. It is the essence of the *contrat de louage* that there should be a certain enjoyment or a certain use of a thing, which the lessor [*locateur*] binds himself to give to the lessee [*locataire*] during the agreed time. That is properly the object and substance of the *contrat de louage*. The kind of enjoyment or use which one gives by a letting [*bail*] is either expressed therein, or is not. When it is expressed therein, the lessee cannot use the thing for any other use than that which is expressed in the letting. For instance, if a horse is let to you to go to Lyons, you must take it no further.” “No. 23. Where the kind of enjoyment or of use is not expressed in the letting, the contract is nevertheless enforceable. In such the object and substance of the contract is the kind of enjoyment or use for which the thing is by its nature destined, and to which it is usual to put it [*auquel la chose est de sa nature destinée, et auquel on a coutume de la faire servir*”]. He proceeds to express an opinion that where the *locataire* is of a known profession or trade, it may make a difference; for example, a lease of a house in a village is, he says, to be taken to be let to be used as a house, and the lessee cannot set up a forge in it; but if it is let to the village blacksmith, the presumption would be different.

There can, I think, be no doubt of the good sense of these observations. I suppose if two men hire, one a boat to go from Maidenhead to Windsor, and the other, by exactly the same words, a dog-cart to go from Maidenhead to Windsor, it would need no contract on the part of the hirers to show that the boat was let to be “used mainly for the purpose of travelling on the river,” the dog-cart upon the highway, for the things hired are each *de sa nature destinée* to these uses. And I think the case of *Harper v. Davies* (1), which was, I think,

rightly decided, is a proper application of the doctrine of Pothier. The grass farm was let to a farmer by profession, and must be taken to have been let to him to be used so as to make a profit; and though there was no express contract to prevent the tenant from letting the grass rot upon the ground, or, though he could not sell the hay, making any use of the hay which the ingenuity of counsel might suggest—though it was one that a tenant-farmer would never think of—it was, I think, rightly held that, being debarred from selling the hay, it must be taken that the land was let to be used mainly as pasture, the meadowing being only ancillary to that, the only other purpose for which grass land was from its nature destined, and to which it was usual to put it.

LORD WATSON.—My Lords, unless an appellant can show that the holding in dispute is within the exception established by section 58 (3) of the Land Law (Ireland) Act, 1881, the provisions of that statute must apply to it. The appellant has, in my opinion, failed to satisfy the *onus* thus incumbent on him. The holding is proved to be of the yearly value requisite to bring it within the exception; but it has not been shown to my satisfaction that it was “let to be used wholly or mainly for the purpose of pasture.” Whenever the contract fixes, either expressly or by implication, the uses which the tenant is to make of his holding, it must, I apprehend, be conclusive as to the purpose for which the holding is “let to be used.” If the purpose referred to in section 58 (3) must be an exclusive purpose prescribed by the contract between the lessor and lessee, it follows that in none of these cases could it be held that the land was let to be used for any particular purpose. In that view a tract of hill country, quite unfit in any ordinary sense to be used for other than grazing purposes, would not, although the tenant never did use it, and never dreamt of using it, except for grazing, be a holding let to be used mainly for the

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purpose of pasture within the meaning of section 58 (3). There would be nothing in the contract to hinder the tenant from reclaiming the land, and converting it, at an enormous cost, into an arable farm "or a market-garden," although it might be unreasonable or foolish to suppose that any tenant would do so. I cannot think that such was the intention of the Legislature. It appears to me that, in those cases where the particular purpose for which the holding is to be used is not defined by contract, the Legislature must have intended that the purpose should be ascertained by reference to the use or uses which the contracting parties must, as intelligent and reasonable men, be held to have in their contemplation when they entered into the lease.

I think the actual mode of occupation adopted by the tenant will always be an important factor in ascertaining for what, if any, particular purpose his holding was let to be used. If, without violating any of the conditions of his lease, the tenant were to occupy the holding mainly for agricultural purposes, it would be difficult, if not impossible, to hold that it had been let to be used mainly for the purposes of pasture. On the other hand, though the tenant were to use the lands mainly for pasture, it would not, in my opinion, necessarily follow that the holding had been "let to be used" for that purpose. I think it would be necessary, in addition, to prove some facts in relation to the character and capabilities of the holding, from which it might be inferred that the tenant could not reasonably have contemplated any other use. It is in this latter respect that the evidence which was adduced by the appellant in this case appears to me to be defective; and it is because of that defect that I have come to the conclusion that he has failed to establish that the holding in question was let to be used mainly for the purpose of pasture.

I am, therefore, of opinion that the appeal ought to be dismissed with costs.

Lord Fitzgerald concurred.

Order appealed from and affirmed, and Appeal dismissed with costs.

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NOTE.—See section 5 of the Land Law (Ireland) Act, 1896—L.R.I., xiv., 319.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

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(Before ASHBOURNE, C., and FITZGIBBON and BARRY,
L.JJ.)

Flannery v. Nolan.

Appeal by the tenant from an order of the Land Commission, dated the 13th July, 1886, affirming the Sub-Commissioner's order dismissing the tenant's originating notice to fix a fair rent.

*Land Law (Ireland) Act, 1881—Contract of tenancy—
Letting wholly or mainly for purposes of pasture.*

On the 12th May, 1870, a letting for one year was made of 67 acres, 2 roods, 6 perches, Irish measure, the tenant binding himself to use the part of the said lands then in grass, containing 47 acres, 1 rood, 28 perches, for grazing purposes only, except as much meadow as would be required for the stock on the lands in grass, and which was to be consumed on the lands. The remaining part of the lands was in possession of other tenants. A further agreement for letting was entered into in the following year, containing the same stipulations as to grazing and meadowing; and after reciting that the farm had always been let as

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a grazing farm, and was over £50 valuation, the tenant thereby contracted himself out of the Land Act of 1870.

Flannery
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Appeal by the tenant from an order of the Land Commission, dated the 13th July, 1886, affirming the Sub-Commissioner's order dismissing the tenant's originating notice to fix a fair rent.

Held, that the tenant was not entitled to apply under the Land Law (Ireland) Act, 1881, to fix a judicial rent of the holding.

M'Carthy v. Swanton (1); *Maconchy v. Robertson* (2), referred to.—I.L.R. xx., 537.

SUPREME COURT OF JUDICATURE.

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Appeal.
July 12,
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(Before LORD ASHBOURNE, C., PORTER, M.R., and
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Byrne v. Hill.

*Holding let to be used mainly for the purpose of pasture—
Restriction in lease as to tillage—2 acres only to be
broken up out of 75 acres, 1 rood, 4 perches.*

*O'Brien v. White, Holmes v. Lauder, Battersby v
Nicholson, Eivers v. Hamilton, and Ball v. Maxwell
referred to.*

By lease, dated 28th March, 1840, H. demised to B. a farm of 75 acres, 1 rood, and 4 perches, Irish plantation measure, in the County of Meath, for sixty-one years, at £158 per annum. The lease contained a covenant not to break up more than 2 acres, but did not contain any covenant against meadowing, and hay

could be produced on the holding. But, with few exceptions, the holding had been uniformly used for grazing. The farm consisted of grazing land in a rich grazing district, and the report of the Sub-Commissioners stated that the lands comprised 42 acres of second-class fattening-land, 58 acres, 3 roods, of first-class store pasture, and 20 acres, 2 roods, of second-class store pasture. They also reported that this was a good grazing holding, and could be nothing else, and that the holding was being used (*i. e.*, for grazing) in manner best suited to its productive power:—

The Sub-Commission (Kane, Q.C., A.L.C.) dismissed the application. The Land Commission (Fitzgerald, Q.C., and Wrench) reversed the decision.

Held (reversing the decision of the Land Commission), that the farm was let to be used mainly for the purpose of pasture.

LORD ASHBOURNE, C.—We have heard this case very fully and ably argued. It raises topics of interest and, no doubt, of importance to both parties. It appears that Mr. Byrne, the tenant, holds a farm in the County of Meath under a gentleman named Hamilton, the total acreage of which is 121 acres, 3 roods, 29 perches. The landlord contended that it does not come within the purview of the Land Act, inasmuch as it was let wholly or mainly for the purpose of pasture. That is the controversy that was knit before the Land Commission, and again before us now.

The Land Commission, composed of Mr. Commissioner Fitzgerald and Mr. Wrench (Mr. Justice Bewley being absent), arrived at a conclusion in favour of the tenant's contention. The landlord, being dissatisfied, served notice of appeal, and the question has been thus again discussed before us. It is interesting to notice the documents in the case, which are of high importance. In the view I take of the case I do not propose to discuss at all some of the legal points referred to by

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Mr. Kenny, and which Mr. Walker discussed at greater length, although my own impression is that if I did, I would arrive at the conclusion that the tenant represented the interest here quite sufficiently for the purpose of this discussion. I take, in the first place, a document, not framed in the landlord's point of view, but which should speak with the very highest authority; and that is the report of the Sub-Commission 'itself. It must be assumed to have been prepared with the most earnest desire to arrive at a correct conclusion on the point in controversy for their own guidance; and the gentlemen who arrived at that conclusion were gentlemen of experience, Mr. Mowbray and Mr. Martin, who are members of the Commission presided over by the Legal Sub-Commissioner, Mr. Kane. Independent of the report, what are the facts? The lands would appear to be such as would naturally be let mainly or wholly for the purpose of pasture. The lease itself indicates that it was a grass farm, and there was no power to break up more than two acres; that nothing was said on the subject of meadowing; but it was plainly a grass farm, with restrictions on the breaking up of more than two acres. The landlord's contention, under these circumstances, is, that it was let wholly or mainly for the purpose of pasture. What are the findings of the Sub-Commission in their report on the point? In the schedule of the classes of land of which the farm consisted, they report that it consisted of "permanent pasture lands. First-class fattening-land—none. Second-class fattening-land—42 acres. First-class store pasture, 58 acres, 3 roods. Second-class store pasture—20 acres, 2 roods." So far this is the very strongest argument I can conceive in favour of the contention of the landlord.

Then comes the question:—"For what purposes is the holding most suited?" and the answer is: "Suitable for grazing cattle and sheep." The carrying power

is stated thus:—"Holding will carry sixty-five two-year bullocks for summer six months, and thirty sheep. Hay could be produced on the holding." If one might put it shortly, those seven words represent the whole case of the tenant—"Hay could be produced on the holding." The next heading in the report is:—"Give approximate area under each crop for the year," &c.; and the answer is: "No crops; all pasture." And then there is the question:—"Is the holding used in the manner best suited to its productive power?" and the answer is that it is so used. Then there is the observation that there are no buildings, except a small herd's house: just the kind of house that would be needed on a pasture farm. The special incidents of the holding, such as aspect, elevation, &c., are stated. "This is a good grazing holding, and could be nothing else." Is it possible, in the face of that document of tremendous force, to deny that the holding is a pasture holding—that it must have been let as a pasture holding, and used for no other purpose? I take it that the Sub-Commission arrived at a conclusion that it was a holding let mainly—I would say entirely and substantially—for the purpose of pasture; and I could not understand the Sub-Commission, with these findings, arriving at any other conclusion. Then the matter came before the Land Commission, and Mr. Fitzgerald's Judgment is extremely short, but not the less interesting on that account. He says:—"I am of opinion that we cannot, without superseding the existing decisions, hold that these lands were let mainly for the purpose of pasture. There is nothing to exclude the tenant from meadowing the holding, and both our valuers and the Sub-Commissioners report that it is suitable for the production of hay." I do not agree at all with that Judgment of Mr. Fitzgerald. I do not find that there is any decision which in the slightest degree supports the conclusion at which the Land Commission have arrived

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in this case; and I am unable to find that there is anything on the face of this report to support the statement that the valuers arrived at the conclusion that the holding was suitable for the production of hay. But when I turn to the valuers' report, there is not a syllable on the subject, good or bad; the columns of the report that we have before us are absolutely a blank on the head of cultivation. "The holding is used in the manner best suited to its productive power, but is not well cared." The evidence is not confined to the report of the Sub-Commissioners or of the valuers; but, even taking it on those independent documents, without going into the landlord's evidence, the case is overwhelming against the tenant, and demonstrates the landlord's case.

Then what are the decisions we have been referred to? *Westropp v. Elligott* (1) is a decision of the House of Lords; and there is a passage in Lord Fitzgerald's Judgment in that case which has been relied on by the parties. "Did the parties, on the occasion of the letting, intend that the farm should be used mainly for pasture? That intention is to be collected from the contract, aided by the light of the then existing circumstances of the land, the custom of the country, and other then surrounding circumstances." I have arrived at the conclusion that, looking at all the surrounding circumstances, the nature of the country, and the *res ipsa*, the parties did, in the words of Lord Fitzgerald, "intend that the farm should be used mainly for pasture." Mr. Fitzgerald rightly says they must not supersede the authority of that decision; but, in my opinion, it does not support his Judgment. Bewley, J., was not present when this appeal was heard. But I have two of his decisions here, referred to by Mr. Kenny:—*Eivers v. Hamilton* (2). In that case lands that had been in pasture for many years, with a herd's house thereon, situate in a district practically consisting

of grazing farms, were let on lease, with a covenant against erecting any additional buildings, except sheds for cattle, without the consent of the lessor, but with no restriction against tillage or meadowing; and it was held that, under the circumstances, the lands were let to be used mainly for pasture. Here there is a stringent restriction against tillage, the tenant being allowed to till only 2 acres. In the other case there was no restriction against tillage or meadowing, yet Bewley, J., arrived at the conclusion that, notwithstanding that, taking the whole case into consideration, he could not resist the conclusion that the letting must have been made, from the nature and character of the farm, its user, and the most profitable way of working it, as a pasture farm. At the conclusion of his Judgment he says:—"The continuous use of the holding in the present case as a grazing farm for upwards of half a century; the situation of the holding in an essentially grazing district; the fact that the holding, at the date of the letting, was only equipped with such buildings as were necessary for a grazing farm; and the provisions in the contract of letting practically prohibiting the tenant from erecting any additional building, save those that would be found suitable for a grazing farm; as well as other circumstances of minor importance—lead us irresistibly to the conclusion that it was the intention of the landlord to let, and of the tenant to take, the lands in question wholly or mainly for the purposes of pasture." That is a decision very much in point. It is hardly possible to conceive a decision more closely analogous to the present case.

There is one other case, also a decision of the Land Commission, presided over by Bewley, J., with Mr. Commissioner Fitzgerald and Mr. Wrench as his colleagues. It is the case of *Ball v. Maxwell* (1), and the head-note states: "Lands in pasture forming one field were let on lease with covenants against building or

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breaking up any portion, except during the first three years of the term, without the consent of the landlord, but with no restriction against meadowing. The lands could only be profitably used for grazing. *Held*, that the lands were let to be used mainly for "pasture." Could there be a stronger case? There was no restriction against meadowing. In the former there was no restriction against either meadowing or tillage, and they came to the conclusion, from the character of the farm, that it must have been let for the purpose of pasture. I shall only read one passage: "It has been argued on behalf of the tenant that, inasmuch as there is no prohibition in the lease against meadowing, they cannot be considered as being so let. However, we have had the evidence, in the first instance, of Mr. Barnes, who has proved that there is no portion of the land that could be properly considered as meadow lands, and that, although true, it is all the lands would grow grass, and that if the grass were not eaten down, it could be mown, yet the lands could not be profitably used for the purpose of meadowing; and, further, that all the lands being in one large field, it would be a physical impossibility to meadow one portion of it, retaining the other portion for pasture. We have, in addition to the evidence of Mr. Barnes, the evidence of the tenant himself, who, on cross-examination, admitted that the lands could not be used profitably for meadowing, and that, therefore, as a matter of fact, they had always been used by him for pasture. Under these circumstances, having regard to the history of the holding, the covenants in the lease, and the nature of the holding itself, we are of opinion that the letting was a letting mainly for the purpose of pasture."

I am of opinion, on the whole case, that the decision of the Land Commission was erroneous, and that the appeal must be allowed with costs.

PORTER, M.R.—I am of the same opinion, and I wish only to add a few words to what the Lord Chancellor has said. On the first point argued—viz., as to the *status* of the tenant, I do not think it necessary to pronounce a positive opinion. In the view we take of the case it is not necessary to do so. But on the facts proved I should be slow to decide against him on that ground alone. He represents the entire interest in the lease of 1840, both legal and equitable, and he is in possession. No doubt, the lease of 1861 has not merged in law, and his possession may be under it, as well as under that of 1840. But having regard to the trusts on which the latter lease was held, and to the fact that, subject to the jointure for his wife, the tenant is also entitled to the whole interest under it, I have not heard any argument which has satisfied me that he is not in a position to maintain the present proceeding, if not otherwise disentitled to do so. On this point, therefore, I do not decide against the tenant, though I abstain from giving a positive opinion in his favour.

Upon the other and main question I entirely agree with the Lord Chancellor, and for the reasons given by him. I think that the learned Commissioner whose decision is appealed from, has fallen into an error in reference to the facts of the case before him on the report of the Sub-Commissioners and the report of the Court valuers. As regards the report of the Sub-Commissioners, they find that this land is permanent pasture land—part of it is all pasture land—that it is suitable for grazing cattle and sheep; that the holding will carry sixty-five two-year-old bullocks for the summer six months and thirty sheep; and that in that way it was used to the best possible advantage. They also add that not only was it a good grazing farm, but that it could be used for nothing else. The report also states that hay could be produced on the holding—that is (as I understand it), it could be produced if the land were

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not turned to its only proper and most productive use. It was a holding suitable for nothing else than grazing, though, no doubt, it could be used for the temporary purpose of growing hay. If land can grow grass, of course, it can produce hay, provided there is sunshine enough to dry it, and there is nothing to show that it would be less so in the case of this farm than any other. Then, again, this is land that never had been used for meadowing until a period of time about two years before the hearing, when it was let for a couple of seasons; the tenant being in bad health let it to a neighbour to make the best use he could of it, with liberty to meadow it. That was suspiciously near the passing of the Land Act of 1887. But that is the only instance of its being used for meadowing, and it had never been used since 1840 for anything but grazing. The tenant in the lease of 1840 is described as a grazier; and, in point of fact, commencing with the express terms of the agreement, I am unable to conceive a case in which, in the absence of negative words, the purpose of the letting was more plainly shown as being a letting for pasture.

Well, is that enough? Mr. Fitzgerald and the Commissioners seem to have thought that it was not. Mr. Commissioner Fitzgerald says that the case is distinguishable from *Eivers v. Hamilton* (1) in this, that there is a covenant against tillage of more than 2 acres—a restriction which did not exist in *Eivers v. Hamilton* (1). The argument is that, inasmuch as tillage is excluded by the express agreement, meadowing, which is not so excluded, must be presumed to be permitted. I do not concur in that opinion. It seems to me that the idea of meadowing was not present to the minds of the parties at all.

The next case was *Ball v. Maxwell* (2), and there tillage was excluded in the same way that it was here, meadowing not being referred to; and it was held that the lands were let mainly for pasture. But is the

decision of the Land Commission reconcilable with the language of Lord Blackburn in *Westropp v. Elligott* (3), where, referring to the decision of O'Hagan, J., and Mr. Litton, from which he dissented, he says:—"They also lay it down that though the lands were of such a nature that they could not in the ordinary course of things be used except for pasture, they could not be held to have been let to be used as pasture, unless the Court could imply a covenant that they should be used in that and no other way. I do not, as at present advised, agree in that." And Lord Watson said (4):—"There would be nothing in the contract to hinder the tenant from reclaiming the land, and converting it into an arable farm or a market-garden, although it might be unreasonable or foolish to suppose that any tenant would do so. I cannot think that such was the intention of the Legislature. It appears to me that in those cases where the particular purpose for which the holding is to be used is not defined by contract, the Legislature must have intended that the purpose should be ascertained by reference to the use or uses which the contracting parties must, as intelligent and reasonable men, be held to have had in their contemplation when they entered into the lease." It appears to me that every word of that is applicable to the present case, and, therefore, so far from our decision overruling the authorities, it is entirely consistent with them, and we are simply following what has been laid down by the House of Lords in reversing the decision now before us.

FitzGibbon, L.J., concurred.—L.R.I., xxx., 603.

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(Before WALKER, C., SIR PETER O'BRIEN, C.J.,
FITZGIBBON and BARRY, L.JJ.)

Flanagan v. Crofton.

Lease—Purpose of letting—Mainly for pasture—Lease of two farms five miles apart—One holding—One of the farms, 138 acres, "shall be used and treated as a grass farm;" the other, 40 acres, liberty to break up entire of it, as shall be deemed advisable—"shall consume on said lands all hay that shall grow on said lands"—Land Law Acts, 1881-87.

The Sub-Commission fixed a fair rent. The Land Commission dismissed the originating notice. The Court of Appeal affirmed the decision of the Land Commission.

The facts appear in the following Judgment of Mr. Justice Bewley, in which Mr. Fitzgerald, Q.C., Commissioner, concurred.

BEWLEY, J.—The tenant's right to fix a fair rent was disputed on the ground that the holding was let to be used mainly for the purpose of pasture. The holding consists, in fact, of two distinct farms—Ballyhaba, containing 138 Irish acres, and Toomona, containing 40 Irish acres, about five miles apart—which together, however, only constitute one holding, inasmuch as they are both demised by a lease of 28th May, 1860, at a single rent of £282 a-year, for a term of thirty-one years. In this lease is a covenant by the lessee that he would not, during the continuance of the demise, break up, or cause, or permit, or allow to be broken, any part

of the lands of Ballyhaba, save 5 acres for a herd's garden, without the consent in writing of the landlord. And there is a further provision that if he did break up any portion of Ballyhaba over and above 5 acres without such consent, he was to pay a penal rent of £10 for every statute acre; and then the case proceeds in these words:—"It being the intention of the parties hereto that the lands of Ballyhaba shall be used and treated as a grass farm; but it is hereby declared by and between the parties hereto that it shall be lawful for the said J. Lynam to break up and till so much of the lands of Toomona as shall be reasonably required for the use of the persons in occupation of the dwelling-house on the said farm of Toomona, or to break up and till the entire of the said lands of Toomona, if it shall be deemed advisable; and also that the said J. Lynam, his heirs, executors, administrators, and licensed assigns, shall consume on the said lands all hay or meadow that may during this demise grow on all the said lands." The lands of Ballyhaba were necessarily let to be used mainly, if not wholly, for the purpose of pasture, inasmuch as only 5 acres for the herd's garden would be broken up; and it was declared to be the intention of the parties that the whole should be used as a grass farm, and there is also this provision, applying to all the lands, that all the hay or meadow produced should be consumed on the premises.

The Judgments of Lord Blackburn, J., in *Westropp v. Elligott* (9 Ap. Cas., 825), *ante*, and of FitzGibbon, L.J., in *O'Brien v. White* (16 L.R.I., 28), and in *Fullham v. Garry* (26 L.R.I., 698), show that the purpose of a letting is distinct from its terms. The purpose of a letting may sometimes be gathered from the terms of the contract of letting; but in other cases the contract may be entirely silent as to the purpose, which must then be ascertained from evidence outside the contract. Lands may be let to be used for the purpose of pasture, though the tenant

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may not be bound by contract to use them in any particular manner. The question for us to decide in the present case is whether the holding was let to be used mainly for the purpose of pasture, and not whether the lessee can or cannot break up and till the lands of Toomona without violating the terms of his lease. As to the lands of Ballyhaba, it was part of the contract between the parties that they should be used mainly for the purpose of pasture; and when we come to these elaborate provisions made in reference to the breaking up and tilling the lands of Toomona, it is manifest that, whatever the effect of these provisions may be, the lands were regarded as primarily a pasture farm, which was only to be broken up under certain circumstances.

The Court of Appeal, without calling on the respondent's counsel, *Held*, that the purpose of the letting of the lands was for pasture, and that the leave given to break up the land only meant if it was advisable for the purpose of keeping the lands in proper condition as a pasture farm, and accordingly dismissed the appeal.—I.L.T.R., xxvi., 128.

SUB-COMMISSION.

Sub-Com.
November 25,
1893.

(Before GREER, A.L.C.)

St. George v. Browne and St. George,

Land Law (Ireland) Acts 1881, 1887—Leasehold land capable of being used for tillage purposes.

GREER, A.L.C.—This case was heard at Gort. The area of the holding is 140 acres; the rent is £110. The tenant holds under a lease for three lives or thirty-one years. The lease is not dated, but it was executed in

the year 1873. The lands consist of two denominations, which are surrounded by an adjoining demesne, and the tenant also occupies the demesne lands, and resides in the mansion-house which is upon it. The tenant's father was the owner, and some years ago a portion of the lands was in the occupation of tenants who surrendered their interest to him. The tenant stated that he had tilled some seven acres, but that twelve years ago he discontinued the tillage, and he has since pastured and meadowed the holding, removing the hay to his adjoining lands. The lease is an ordinary agricultural lease. It is silent as to the object of the letting or the user of the holding. There is no prohibition on the tenant either as to tillage or meadowing, and he is free to remove the hay and dispose of it as he pleases. The case of *Byrne v. Hill* is a valuable authority, affording the clearest dictum as to the principles which should govern the Court in dealing with pasture holdings. It is reported in Irish Law Reports, xxix., 603. In that case the lease contained a covenant prohibiting the tenant from breaking up more than two acres, and did not contain any covenant against meadowing. The land was undoubtedly fattening-land, situated in a grazing district, and its use as a grazing holding was best suited to its productive power. There the Court of Appeal dwelt strongly upon the fact that the lands were such as would naturally be let mainly or wholly for the purpose of pasture, and that they could be most profitably used for grazing purposes. In this case my colleagues report to me that five-sixths of the holding is capable of being tilled, and that it presents indications of having been tilled, although not recently. It is to be observed that in *Byrne v. Hill* the date of the lease was 1840; here it is 1873; and that is a fact that cannot be disregarded in considering the present application. The demise is made three years after the passing of the Act of 1870, when pasture holdings had been the subject of

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Sub-Com. several important legal decisions, and few persons connected with the management of property in Ireland could be ignorant of the effect of that statute. Yet this lease, executed in the light of legal decision, is wholly silent as to the purpose of the letting. It contains no allusion to pasturage, and there is no restriction whatever upon the tenant as to tillage or meadowing. Coupling that with the fact that a large portion of the holding was originally in the occupation of tenants, and that the present lessee tilled a considerable portion of the farm without any objection or remonstrance on the part of the lessor, we are of opinion that it was not contemplated by the parties that this holding should be used exclusively as a pasture holding, and we fix the judicial rent at £90.

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This decision was subsequently affirmed by the Land Commission on appeal.

[Not reported.]

SUPREME COURT OF JUDICATURE.

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Appeal.
December 19,
1893.

(Before WALKER, C., PALLES, C.B., and FITZGIBBON,
L.J.)

M'Cormick v. Loftus.

Land Law (Ireland) Act, 1881, section 58—Holding let to be used mainly for the purpose of pasture—Ancient pasture—User and character of the holding—Lease silent as to purpose.

Lands were demised to the tenant in 1871 by a lease which was silent as to the purpose of the letting, and contained no restrictive covenants, except that the

lessee would not alien or build cabins on the holding without the lessor's consent. Owing to its user prior to the date of the lease, the greater part of the holding was, at the date of the lease, ancient pasture. Since the date of the lease no portion of the lands had been tilled by the tenant. The lands were situated in a grazing district, and were not equipped for tillage, having only a herd's house, and no other buildings. Evidence was given that a considerable portion of the lands was capable of being tilled, but that pasture would be the more profitable user.

Held, that the letting was made mainly for the purpose of pasture.

Appeal by the tenant against an order of the Land Commission dismissing his originating notice to fix a fair rent of his holding.

The lands of Ballyragget, in County Westmeath, containing 413 acres, 1 rood, 26 perches, statute measure, were, by lease dated 1st June, 1871, demised to the tenant to hold for two lives or thirty-one years, whichever should longest last, at the rent of £536 1s. 9d. The valuation of the holding exceeded £50.

WALKER, C.—We do not think it necessary to call upon counsel for the landlord. This is a stronger case than most of those which have come before this Court in which the question to be decided has been whether the holding was let to be used mainly for the purpose of pasture. It is well settled that whenever this question arises two matters have to be considered—first, the terms of the letting; and, secondly, the purpose of the letting; and, in considering what is the purpose of any particular letting, we must also bear in mind that the purpose may be implied as well as expressed; and where the document constituting the letting is silent as to the purpose, we can look for evidence of that purpose *dehors* the document.

In this case for the thirteen years next preceding the

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making of the lease in 1871 no portion of the holding was tilled. During the seven years preceding 1858 the largest amount tilled in any one year was 14 acres, Irish. Thus, during the twenty years preceding the lease the maximum number of acres broken up was 98 out of a farm consisting of 285. Accordingly, we have at the date of the lease a portion of the demise, consisting of at least 150 acres, stamped with the character of ancient pasture. There is an implied obligation on the tenant that he will not break up this portion; and if he attempts to break it up, he can be restrained by injunction. It is true that the fact that an injunction can be obtained need not necessarily be present in a case of this kind to prove that a holding is let as a pasture holding; still, where such an injunction can be obtained as to so large a portion of the subject-matter of the demise, it furnishes strong evidence in aid of the other circumstances that exist. Mr. Campbell has argued that the principle of *Murphy v. Daly* (1) would not apply to a letting made since 1870. But I can see nothing in the Act of 1870 to prevent its applying, if there is nothing in the lease about breaking up the land.

It is clearly laid down in *Westropp v. Elligott* (1) that foremost amongst the matters furnishing evidence of purpose *dehors* the agreement we are to look to the character and user of the land. All the circumstances here seem to imply that the purpose of the letting was for pasture. The father of the last tenant levelled all the cottiers' houses, leaving only a herd's house. In character the land is capable of being tilled; but it does not therefore follow that it was in the contemplation of the parties that it should be tilled. The user, in fact, would negative any such idea, for no part of the holding has been broken up during the lease. Scattered in every field there are to be found rocks, which is consistent with the holding being profitably used for pasture, but not for tillage. The meadowing that was proved is

not inconsistent with its being a pasture letting; for there was no meadowing except for winter feeding. On the whole, I have come to the conclusion that the holding was both equipped as a pasture holding and used as such. It has a herd's house and no other buildings; it is situated in a grazing district; in character, as well as in use, it is a grass farm; and it is impossible to resist the conclusion that it was so meant to be used by the parties; in other words, that such was the purpose of the letting.

Palles, C.B., and FitzGibbon, L.J., concurred.

Appeal dismissed with costs.—I.R., vol. ii., 467, 1894.

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Sub-Com.
June,
1894.

(Before GREER, A.L.C.)

Blake v. Blake.

Land laws—Pasture holding—Small portion under tillage.

Where a contract of tenancy of a holding of 150 acres was silent as to the nature of the holding, which was in a grazing district, and had been occupied by tenants engaged in grazing operations, and was now all, except 7 acres, in pasture: Held, to be a pastoral holding.

Application to fix a fair rent. The area was 150 acres, 2 roods; the rent, £194 7s. 2d. The facts appear in the Judgment.

GREER, A.L.C.—This case was heard at Tuam. The landlord, through his solicitor, Mr. Concannon, contended that the holding was let to be used as a pasture

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holding, and was, therefore, outside the provisions of the several Irish Land Acts. There was no substantial conflict in the evidence, and it was admitted by Mr. Blake, on behalf of the tenant, that not more than 3 acres had at any time been under tillage, whilst only 2 acres have been meadowed. We had no evidence that the lands were let specifically for pasture purposes, and so far as the contract of tenancy is concerned, I will assume that it was silent upon the subject. We must, therefore, endeavour to discover the purpose of the letting from circumstances *dehors* the contract, and upon that point the history and physical character of the holding appear to me to point to only one conclusion. Briefly summarized, they are as follows :—

(1) The district in which the holding is situated is essentially a grazing district. (2) The holding in question was always occupied by tenants engaged in pastoral or grazing operations. (3) It was originally equipped as a grazing holding, having upon it a herd's house. (4) The lands are what are known as ancient pasture, and, with the exception of some 7 acres, the holding is now all in permanent pasture. My colleagues report to me that it is best suited for grazing purposes, and that it would be unprofitable and unhusbandlike to devote it to tillage. The principles governing cases of this description are so well settled that I need not discuss them. They are to be found very clearly defined in *Westropp v. Elligott* (*ante*), 18 I.L.T.R. 61; 14 L.R.I. 319, House of Lords, which may be read with various other cases dealt in by the Court of Appeal—viz., *M'Cormack v. Loftus* (*ante*), 28 I.L.T.R. 37; *O'Brien v. White*, 16 L.R.I. 15; and notably the Judgment of the Master of the Rolls in *Byrne v. Hill* (*ante*), 30 L.R.I. 608. Lord Watson, in *Westropp v. Elligott*, employs language which is peculiarly applicable to the facts of this case. He says :—"It appears to me that where the particular purpose for which the holding is to be used is

not defined by contract, the Legislature must have intended that the purpose should be ascertained by reference to the use or uses which the contracting parties must, as intelligent and reasonable men, be held to have had in their contemplation when they entered into the contract." Having regard, therefore, to the undisputed evidence of the history of this holding, its situation, continued user, physical condition, and character, I have no doubt that it was present to the minds of both parties, at the time of the original letting in 1865, that the holding was let and taken to be used as a pasture farm. The application is, therefore, dismissed.—I.L.T.R., xxx., 124.

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LAND COMMISSION.

Land Com.
November,
1895.

Before BEWLEY, J., and FITZGERALD, Q.C., and
LYNCH, Commissioners.)

Burke v. Westropp.

Pasture holding—Lease—Portion under tillage—Valuation agreement—Surrender—Buildings.

Where under the terms of a lease a lessee might in one year have 45 acres plantation measure out of 120 under tillage or meadow, and where in 1882 the lessee (together with the other leaseholders on the estate) entered into an agreement to be bound by a valuation to be assessed on their holdings, as if that valuation was the rent reserved in their respective leases :

Held, that the land was a mixed and not a pasture farm, and that a surrender of the lease had not been contemplated, and that a fair rent could be fixed.—I.L.T.R., vol. xxx., 15.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
June,
1896.

(Before ASHBOURNE, C., SIR PETER O'BRIEN, C.J.,
and FITZGIBBON and BARRY, L.JJ.)

Hanlon and Fay v. Bor.

Holding let mainly for the purposes of pasture—Proportion that may be tilled—Land Law Act, 1881, section 58.

A holding was leased for fifteen years to a butcher and another man in the cattle trade. The lease provided that not more than 30 acres, Irish, out of 163 acres, statute, should be broken up in any one year, and no house be erected without consent. The Land Commission, affirming the Sub-Commission, held that the holding was a pasture holding. The tenant appealed. The appeal was allowed, with costs.—Case remitted to fix a fair rent.

NOTE.—In a previous case between the same parties, and dealing with the same holding, the originating notice was dismissed by the Sub-Commission, on the ground that the lands were demesne lands. The Land Commission affirmed that decision. On appeal to the Supreme Court, their Lordships reversed the decision of the Land Commission, and remitted the case to the Sub-Commission to fix a fair rent. Hence the second hearing, and the above appeal.

SUB-COMMISSION.

Sub-Com
July 11,
1896.

(Before GREER, A.L.C.)

Pelly v. Smith.

*Land Law (Ireland) Act, section 58, sub-section 4—
Pastoral holding—Adjoining tillage farm—Public-house.*

GREER, A.L.C.—In this case the tenant holds 84 acres, 15 perches, of a pasture holding at the yearly rent of £50. He also holds a tillage farm, containing about 18 acres, on which he resides, and which he works in connection with the larger holding now before the Court. Mr. Blake contended that, under the circumstances, the tenant was within the provisions of sub-section 4 of the 58th section of the Land Law (Ireland) Act, 1881, which removes from the class of pasture holdings excepted by the Act "any holding let to be used wholly or mainly for the purpose of pasture, the tenant of which does not actually reside on the same, unless such holding adjoins or is ordinarily used with the holding on which such tenant actually resides." Mr. Concannon, for the landlord, relied on the fact that the dominant part of the holding on which the tenant resided consisted of a public-house, and that it did not answer the definition of a holding as given in section 57 of that Act. He admitted that the point was an extremely narrow one, and, so far as I am aware, this is the first application in which such a strained definition of the term "holding," as employed in sub-section 4, has been suggested. Now, according to the evidence, the public-house, which is upon the tenant's "home-farm," was erected and the licence for it obtained by the tenant himself. The holding was let as an

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agricultural farm, and the 18 acres are tilled and used for agricultural purposes, and, without expressing any opinion as to whether or not that holding *per se* would be embraced within the fair rent provisions of the statute of 1881, I am of opinion that it is a holding of such a residential character as is contemplated by the provisions of the 4th sub-section of section 58 of the Act of 1881. If I were to adopt the definition of the term "holding" which was contended for by Mr. Concannon, and apply it to the tenant's residential holding, I would, under the circumstances of the case, be defeating the remedial intentions of the Legislature.

The Land Acts, although they are not free from embarrassing ambiguities, were passed to be worked and not defeated, and as remedial enactments they should be liberally interpreted. "Holding," as defined by the 57th section of the Act of 1881, must be taken to mean a holding which in its various elements fulfils all the requirements of the Act, and is capable of having a fair rent fixed upon it. Such a definition was not, however, intended to be applied to a holding which may or may not be outside the Act, and which is held in connection with a pasture holding which by a saving proviso is brought within the Act. For instance, it would be quite possible for a tenant to be in the occupation of a demesne holding upon which he could not get a fair rent fixed, and, at the same time, he might be the occupier of a pasture holding which he used in connection with his residence, and which, were it not for his existing tenancy in the demesne holding, would be excluded from the operation of the statute. In this case the Court is not concerned with the *status* of the tenant in his public-house holding. He may or he may not be entitled to have a fair rent fixed in respect of it. It is his *status* in the holding, which is the subject of the present application, which we have to consider; and the question resolves itself into this: Is the tenant or is he

not in the occupation of a pasture holding under such circumstances as will entitle him to get the advantage of the proviso contained in sub-section 4 of section 58? I am of opinion that he is, and we will, therefore, fix a fair rent in this case.

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1896.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., and FITZGIBBON
and BARRY, L.JJ.)

Appeal.
December 14,
1886.
February 21,
1887.

O'Connor v. Smith.

Land Law (Ireland) Act, 1881—Lease from year to year—Penal rent for breach of covenant—Effect of order fixing fair rent.

By lease the plaintiff demised to A. certain lands, to hold for one year, from 25th March, 1878, and so on from year to year, until the demise should be determined by twelve months' notice, paying £666 rent, and also paying an additional rent of £10 for every statute acre of the land broken up or meadowed in any year above a specified amount, such additional rent to continue during the demise; and A. covenanted with the plaintiff to pay the rent of £666, and also the said penal rents, and also not to meadow more than 45 acres; and the lease contained a proviso that the plaintiff might re-enter whenever there should be a breach of covenant, and that thereupon the demise should determine.

A. meadowed more than the specified amount, and was sued for and paid the penal rent, and subsequently served an originating notice, and the Land Commission fixed £600 as the fair rent of the holding.

Appeal.
February 21,
1887.

O'Connor
v.
Smith.

The plaintiff now sued A. for a half-year's ordinary rent, and also for half-a-year's penal rent for over-meadowing. A., by his defence, relied on the order of the Land Commission Court as fixing the rent payable by him, and brought £300 into Court in satisfaction of the plaintiff's claim.

The plaintiff having demurred to this defence:—

Held, by the Court of Appeal, affirming the Judgment of the Common Pleas Division, that the fair rent fixed by the Land Commission did not include the additional rent which became payable under the special covenants, and that the order fixing it was no answer to the plaintiff's demand for such additional rent. *M'Geough v. M'Dermot*, 18 L.R.I., 217, observed upon.—L.R.I., xx., 393.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
May 4,
1892.

(Before LORD ASHBOURNE, C., and FITZGIBBON and
BARRY, L.JJ.)

Stack v. Muskerrey.

Practice—New evidence on appeal.

Held, a party will not be allowed to give fresh evidence on an appeal from the Land Commission Court, save on special grounds ; but fresh documents of title, a map, and the affidavit of the surveyor, will be admitted.—I.L.T.R., vol. xxvi., 118.

SUPREME COURT OF JUDICATURE.

(Before LORD ASHBOURNE, C., PALLES, C.B., FITZ-
GIBBON and BARRY, L.JJ.)

Case stated by
Land Com.
May 1.
1890.

Farrelly v. Waller.

*Landlord's right of pre-emption—Notice by tenant to
sell—Notice by landlord to purchase.*

*If a tenant who has had a fair rent fixed under the
Land Law Act, 1881, serves a notice on the landlord of
his intention to sell his holding, and the landlord serves
notice of his intention to exercise his right of pre-emption,
the tenant cannot withdraw his notice of intention to sell,
or defeat the right of the landlord to purchase, and any
equities created by the tenant cannot interfere with the
landlord's rights.*

F. held a farm of 95 acres, 2 roods, 10 perches, from W., as tenant from year to year, at a rent of £111 2s. 10d. By an order of a Sub-Commission, dated the 6th July, 1882, the fair rent of the holding was fixed at £111 2s. 10d., and the specified value was fixed at £433. By an agreement, dated the 14th February, 1884, made on the occasion of his marriage, F. agreed to assign the holding in question to his wife at his death, subject to a charge of £50, payable to each of his three children by a former marriage. The landlord had no notice of this agreement. On the 20th August, 1889, the tenant served the landlord with a notice, dated the 18th of June, 1889, of his intention to sell his holding; and, on the same date, the tenant served a second notice of his intention to sell, and that the name of the purchaser to whom he had agreed to sell his tenancy was M., and stating the consideration. On the 26th of August, 1889, the landlord served notice on the tenant

Case stated by
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May 1,
1890.

of his intention to purchase, under section 1 of the Land Law Act, 1881, at the specified value ; and on the 2nd September the tenant served notice withdrawing his former notice of his intention to sell, and that the sale to M. would not be proceeded with.

Held, that the tenant was not entitled to withdraw his notice of intention to sell, once the landlord had signified his intention to exercise his right of pre-emption, and that the agreement of the 14th February, 1884, did not deprive the landlord of his statutory right.—L.R.I., xxviii., 122.

LAND COMMISSION.

Land Com.
June 2,
1896.

(Before BEWLEY, J., and MR. COMMISSIONER
FITZGERALD, Q.C.)

Kelch v. Gormanston.

*Land laws—Sale of tenancy—Right of pre-emption—
Landlord of estate under order of sale in the Land
Judge's Court—Land Act (1r.), 1881, s. 1—Rule 80.*

A landlord of an estate which is the subject of proceedings for sale in the Land Judge's Court, can exercise his right of pre-emption without the permission or control of the Court.

Application by the landlord for an order declaring void a sale of the tenancy, on the ground that the tenant failed to give notice of intention to sell his tenancy prescribed by s. 1 of the Land Act, 1881, and rule 80.

BEWLEY, J.—This was an application by Lord Gormanston for an order declaring void a sale of a tenancy made by James Kelch, the tenant, to Robert D.

Jameson, on the ground that the tenant failed to give the notice of intention to sell his tenancy, prescribed by s. 1 of the Land Act of 1881, and the rules made thereunder. The holding, which contains a little more than 138 acres, statute measure, is situate in the County of Meath, close to Gormanston station, on the Great Northern Railway, and is held under a tenancy from year to year at the judicial rent of £127 10s. per annum.

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The Gormanston estate in the counties of Meath and Dublin, including the reversion expectant on the tenancy of the lands constituting this holding, is the subject of proceedings for sale in the Land Judge's Court. An absolute order for sale was made so far back as the 18th March, 1883, and a receiver was appointed over the owner's estate about the same time. The present receiver is Mr. Edward Synge. Mr. James Kelch, being desirous of selling his tenancy in this holding, entered into negotiations with Mr. Robert D. Jameson, a gentleman of position and means, who resides at Delvin Lodge, close to the holding, and ultimately an agreement was come to that Mr. Jameson should become the purchaser for the sum of £2,000.

Admittedly the notice of intention to sell, prescribed by section 1 of the Land Act of 1881, and rule 80, was not served; but on or about the 2nd March, 1896, the tenant through his solicitor, Mr. M'Gough, served Mr. Edward Synge, the receiver, with a notice, the material parts of which, after the formal statement of the names of the landlord and tenant, and the particulars of the holding, are as follows:—

"Notice of Intention to Sell Tenancy.—I have agreed to sell my tenancy in the above holding. The name of the purchaser is R. D. Jameson, Esq., J.P., of Delvin Cottage, Balbriggan, County Dublin. Amount agreed by him for purchase, £2,000."

At the time this notice was served Lord Gormanston was, and still is, residing at Hobart, in Tasmania, where

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he is discharging the important duties of Governor of that colony. On receiving the notice the receiver very properly communicated to Mr. Beauchamp, Lord Gormanston's solicitor, the fact of the service of the notice. Mr. Beauchamp was aware that his client was desirous of purchasing the castle and demesne of Gormanston when they should come to a sale; and as the holding in question appeared to him to be either part of the demesne or contiguous to it, he lost no time in writing to Lord Gormanston to Tasmania, informing him of the course taken by the tenant, and as to his right of pre-emption, and asking his instructions and to wire reply. The receiver in the meantime wrote to Mr. M'Gough, returning the notice of the 2nd March, and stating in effect that Lord Gormanston should be communicated with before any steps were taken. In a further letter to Mr. M'Gough, of the 18th March, Mr. Synge called his special attention to the fact that the provisions of the Act of Parliament had not been complied with, and that he as receiver could not accept service of the notice without a ruling of the Court.

On the 2nd April, 1896, Mr. Beauchamp wrote to Mr. M'Gough, pointing out also that the regular notice required by the Land Act had not been served, and warning him not to complete the sale without having the prescribed notice served so as to give the landlord the opportunity contemplated by the Land Act of exercising his right of pre-emption. He also asked Mr. M'Gough to let him know how far proceedings for a sale had gone, in order, if necessary, to take such proceedings as might be required for the protection of Lord Gormanston's interest. To this letter Mr. M'Gough replied on the 4th April, stating that he had showed the letter to his client, who pointed out that Mr. Beauchamp omitted to state on whose behalf it was written, and asking Mr. Beauchamp to supply the omission.

No intelligent person reading Mr. Beauchamp's letter

of the 2nd April could have any doubt that it was written on behalf of Lord Gormanston. However, Mr. Beauchamp wrote again on the 7th April, that it was on behalf of Lord Gormanston he wrote the letter referred to, as he, as owner, was the only party who would be entitled to exercise his right of pre-emption under the Act.

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Notwithstanding the cautionary notices which the tenant and his solicitor had so received from Mr. Beauchamp and the receiver, the tenant proceeded to complete the sale, and on the 10th April, 1896, executed a deed of assignment of the holding to Mr. Robert Jameson. On the 22nd April a telegram was received by Mr. Beauchamp from Lord Gormanston in the following terms:—"Tell Synge serve notice; prepared give two thousand; written you Coutts." And on the 2nd May, 1896, the originating notice was served of an application to this Court to have the sale declared void.

This application has been opposed—nominally on the part of the tenant, but in reality by the purchaser—on various grounds. It is alleged, in the first place, that the application is late, and was not made within the time prescribed by the 83rd rule. That rule provides that an application to have a sale declared void shall be made to the Court within one fortnight after the sale shall have come to the landlord's knowledge. There is no reason to believe that the landlord in this case had any knowledge of the sale before the date of his telegram of the 22nd April, and the proceedings were commenced within a fortnight from that date. But it is suggested that time runs from the date at which Mr. Synge, the receiver, had knowledge of the sale. This is not a case in which a formal notice of intention to sell has been served on the agent of an estate. In such case it might well be that the time for taking proceedings to enforce the landlord's right of pre-emption should be held to run from the date of such service,

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even though the landlord himself might have no actual knowledge of the intended sale. But there are no grounds for holding in a case like the present that the knowledge of the sale acquired by Mr. Synge, the receiver in Ireland, must be imputed to Lord Gormanston, 12,000 or 13,000 miles away, in Tasmania. I may add also that if the proceedings in this case had not been taken within the time prescribed by the rules, we should, as a matter of course, have extended the time for taking them, as they could not have been instituted without communication with Lord Gormanston, and the utmost diligence was used in obtaining his instructions.

The next contention is that Lord Gormanston is not the landlord within the meaning of section 1 of the Act of 1881, but that either the Land Judge is to be considered the landlord for the purposes of the section, or that the Judge and Lord Gormanston constitute what may be called a "conjunct landlord." It is submitted that a landlord, within the meaning of the Act, must be in receipt of the rents and profits of the estate, and that as the rents are actually received by the receiver appointed by the Land Judge, Lord Gormanston cannot be treated as landlord. But the appointment of a receiver does not alter the rights of the parties. (*Groom v. Blake*, 6 I.C.L., 400; 8 I.C.L.R., 428; *Moir v. Blacker*, 26 L.R.I., 375.) The possession of the estate is not taken from the owner by the appointment of a receiver, and transferred to the Court or to the incumbancers. The management of the estate is placed under the control of the Court; but the legal position of the owner as landlord is not affected thereby, though some of his legal rights may not be exercisable without the sanction of the Court.

It is then urged that Lord Gormanston could not exercise his right of pre-emption in this case without the permission of the Land Judge, and that as that permission has not been obtained, the present proceedings

are unsustainable. But the interest of the tenant, James Kelch, in the holding in question is not the subject of the proceedings in the Court of the Land Judge, and the receiver has not been appointed over it. The sale or transfer of this interest to Lord Gormanston or to Mr. Jameson, or to any person else, does not interfere with the action of the receiver or of the Court. If no right of pre-emption existed, the Land Judge could not prevent Lord Gormanston from becoming the purchaser of the farm; and where such a right exists neither the Land Judge nor the Receiver Judge could compel Lord Gormanston to exercise his right of pre-emption, nor, in my opinion, could forbid or control its exercise. The right is one given to the landlord as such, and may, in my opinion, be asserted in the present case without obtaining any permission from the Land Judge.

An attempt was made to argue that the just interests of the landlord did not require the sale to be declared void in the present case. We are satisfied, however, that Lord Gormanston *bonâ fide* desires to exercise his right of pre-emption, and that no reason exists why he should be deprived of that right. It is apparently a matter of no practical importance to the tenant in this case whether the right of pre-emption is exercised or not, as Lord Gormanston seems willing to give the same price for the tenancy as Mr. Jameson—viz., £2,000.

The tenant, in spite of repeated warnings, has thought fit to execute a conveyance of his holding to a purchaser without complying with the provisions of the Act of Parliament. The sale must be declared void, and the tenant must pay to the landlord £7 7s. costs.

Note upon pp. 222, 224, 317, 371, and 540 of Cherry and Wakely's Land Acts.

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QUEEN'S BENCH DIVISION.

(Before O'BRIEN, J., and JOHNSON, J.)

Seymour v. Quirk.

Land Law (Ireland) Act, 1881, section 21—Tenant of present ordinary tenancy from year to year—Holding under deed made by immediate lessee whose lease expired before passing of the Act—Assignee—Sub-lessee.

By a lease dated 1st July, 1833, certain lands were demised by James and Abigail Ryan to Edward Quirk, from 1st November, 1832, for the lives of James and Abigail Ryan, and the life of the survivors of them, or for twenty years, whichever should last the longest, at the yearly rent of £70 5s. 2d., payable half-yearly.

Abigail Ryan died before the 5th November, 1866, and all the interest of Edward Quirk, the lessee, became vested in Bridget Quirk previous to the 5th November, 1866. By lease of 5th November, 1866, Bridget Quirk demised to Andrew Murphy all the lands comprised in the lease of 1st July, 1833, for the life of James Ryan, the surviving life in that lease, at the yearly rent of £95 5s. By indenture, dated October 20, 1877, made between James Ryan, senior, and James Ryan, junior, the former assigned to the latter all the reversion expectant on the determination of the lease of July 1, 1833. James Ryan (the other *cestui que vie* in the lease of 1832) died on the 5th of August, 1883, and thereupon both the lease of 1st July, 1833, and the sub-lease of 5th November, 1866, expired. At the time of the death of James Ryan, the defendant Murphy was in *bond fide* occupation of the lands under

the indenture of the 5th of November, 1866. In an action brought by James Ryan, junior, and others, against Andrew Murphy and Bridget Quirk :—

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Held, that the plaintiffs were not entitled to recover, Andrew Murphy being a tenant of a present ordinary tenancy from year to year, within the meaning of the 21st section.

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Per O'Brien, J., Murphy became an assignee of the original lease of July 1, 1833, and as assignee came within the meaning of the term "lessee" in the section.

Per Johnson, J., Murphy became a sub-lessee of Bridget Quirk, and not an assignee of the original lease, but as tenant to her and in *bond fide* occupation of the holding, was entitled to the benefit of the section.

This decision was affirmed on appeal.—L.R.I., xiv., 455.

LAND COMMISSION.

Land Com.
1888.

(Before O'HAGAN, J., & LITTON, Q.C., Commissioner.)

Carney v. Arran.

Land Law (Ireland) Act, 1881, sections 1, 5—Present tenancy—Leaseholder—Expiring of lease after service, and before hearing of originating notice—"Application."

Held, that the "application" mentioned in sections 1 and 5, Landlord and Tenant (Ireland) Act, 1887, refers not to the actual hearing of a claim to have a judicial rent determined, but to the service of the originating notice in such case; and where the tenant was *bond fide* in the occupation of his holding at the dates of the service and hearing, but the lease under which he held expired since the service and before the hearing, he is still a present tenant entitled to have a judicial rent determined.—I.L.T.R., xxii., 88.

Land Com.
1888.LAND COMMISSION.

Willgar v. Crommellin's Trustees.

Present tenant—Expiration of lease—New agreement with tenant continuing in occupation—Making of lease deferred to defeat provisions of Land Law (Ireland) Act, 1887, sections 1, 3.

A lease was made in 1810, and expired on the 14th March, 1881, and upon the 18th October, 1881, the landlord obtained a decree in ejectment; pending the execution thereof, the tenant served an originating notice to have a fair rent fixed, which was dismissed by the Sub-Commission, and their order was affirmed by the Land Commission. The ejectment decree was executed in March, 1882, and the tenant never being out of occupation a written agreement was signed by him for a tenancy from year to year on the 20th March, 1882.

Held, that under sections 1, 3 of the Act the tenant was entitled to have a fair rent fixed.—I.L.T. & S.J., xxii., 543.

Case stated.
1891.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before PORTER, M.R., FITZGIBBON and BARRY, L.JJ.)

Bangor v. Fitzsimons.

Landlord and tenant—Present tenancy—Lease for term of more than ninety-nine years determinable on a death—Chattel lease—Meaning of “expiring within ninety-nine years”—“Lease for life or lives”—Land Law Act, 1887, section 1—Land Law Act, 1881, section 21.

Held, that the phrase “leases expiring within ninety-nine years” means leases which may expire, or are capable

of expiring, not such as must expire, within ninety-nine years, and that the lease in question was a lease "expiring" within the meaning of the phrase.

Case stated.
1891.

Per Barry, L.J.—The lease in question, though in name technically different, is a "lease for a life or lives existing in 1881, without a concurrent term," within the meaning of section 1 of the Land Law Act, 1887.

Bangor
v.
Fitzsimons.

Case stated by the Land Commission.

The applicant was lessee under a lease, dated the 14th December, 1831, "to have and to hold for the full term of 150 years, provided the lives of A, B, and C, or the life of any of them, so long continue, and from and after the decease of the survivor for and during so much as may then remain unexpired of the term of thirty-one years." A was living, alive at the service of the originating notice and at the hearing. The landlord moved to set aside the originating notice, on the ground that the tenancy did not come within section 1 of the Land Law Act, 1887. The Land Commission decided that the lease was within the section, and the landlord applied to have a case stated for the opinion of this Court.

PORTER, M.R.—This question arises on the construction of the 1st section of the Land Law Act, 1887, and on the meaning of the *habendum* of the lease. The last term of thirty-one years is out of the question, as Mr. W. is still alive; so that we have a fixed term, provided anyone so long live. The words of the 1st section are applicable either to leases expiring within ninety-nine years after the passing of the Act of 1881, or to leases for a life or lives then existing, with or without a concurrent term not exceeding ninety-nine years. And the latter class are to be considered as if expiring within ninety-nine years. Now, does this lease not come within that section? In point of law it is a chattel lease, and the reason is that for some purpose the parties wished to have it so. But it is determinable on the death of the last *cestui que vie*, which, in this

Porter, M.R.

Case stated.
1891.

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case, is hardly the correct term to apply. It is sought to bring this lease within the section by Mr. Hume in two ways:—First, it is a “lease for a life or lives then existing.” It cannot be brought within that language, and is not in law a lease for a life. Second, that it comes within the phrase “expiring within ninety-nine years after the passing of the Act of 1881.” Consider whether it must or may expire within ninety-nine years. Mr. Harrison is justified in saying that in law there is no presumption that a life cannot exist beyond ninety-nine years. There is no time in law settling the period of the presumption as to the death of any person now living. Another construction is—those leases which may expire. That is the more rational construction. How could it be extended beyond ninety-nine years? By the life extending more than ninety-nine years after 1881. It would be a narrow construction to hold that it did not come within the section. It comes within the spirit of the Act. The term of 150 years is not concurrent. I do not think we are helped here by such authorities as Coke and Fearne; the Act is to be construed by its own language and that of the Act of 1881. I am of opinion that the rent may be fixed.

Barry, L.J.

BARRY, L.J.—I concur, and I had early in the argument arrived at this conclusion. I take an untechnical view of the matter; but, without depreciating the reasons which have just been given, I am of opinion that within the meaning of this section—not in the feudal sense—this was a lease for a life or lives existing in 1884, and that the term was not concurrent, which latter phrase means that the lease must run its length. The presumption of the continuance of life I do not enter upon. The plain meaning of the second paragraph, taken with the 21st section of the Act of 1881, shows that this lease should be taken as within its language. To say, because the parties for some purpose put in an impossible term of 150 years, or, for that matter, 1,000 years,

which purpose could equally be attained by language creating no difficulty, and that because of that whimsical term the lease is out of the Act, to me seems an extraordinary contention. I was impressed by the language of 7 Wm. III., c. 8, showing that such a lease may be said to be for a life or lives; but I had arrived at my conclusion without its aid.

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PORTER, M.R.—The Land Commission will be answered that so far as the term of this lease is concerned it is within the Act of 1887.

Porter, M.R.

Lord Justice FitzGibbon concurred.

I.L.T.R., vol. xxv., p. 3.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before WALKER, C., PALLES, C.B., & FITZGIBBON, L.J.)

Appeal.
Dec. 19, 20,
1893.
February 24,
1894.

Conroy v. Drogheda.

Landlord and tenant—Land Law (Ireland) Act, 1881, section 20—Present tenant—Surrender of present tenancy—Future tenant—Resumption of possession by landlord—Determination of tenancy—Reverter.

The Sub-Commission (Bailey, A.L.C.) fixed a fair rent, the Land Commission affirmed; landlord appealed; appeal dismissed with costs.

At the time of his death, in 1881, C. was tenant under the same landlord, of two farms—T., containing 61 acres, Irish, subject to a rent of £67 10s., and M., containing 37 acres, Irish, subject to a rent of £31 19s. 6d. On C.'s death T. and M. passed to his

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widow, who retained possession of T., and put C.'s brother in possession of M. In 1884 the landlord recovered possession of M. for non-payment of rent. In 1885 C.'s widow signed a proposal to become tenant of her "old holding" T., together with 10 acres, Irish, of M., "as one holding," subject to a bulk rent of £75. The proposal was accepted by the landlord, and C.'s widow went into possession of the additional 10 acres without giving up possession of T. to the landlord; and she thenceforth paid the bulk rent of £75. C.'s widow served an originating notice, seeking to fix the fair rent of all the lands comprised in the proposal. The Sub-Commission struck the 10 acres, Irish, of M. out of the notice, and fixed a fair rent on T. The Land Commission affirmed this order of the Sub-Commission :—

Held (affirming the decision of the Land Commission), that on the terms of the proposal, and under the circumstances in which it was made, the tenant did not intend to surrender her "old holding;" that in the absence of such intention the "old holding" had not been surrendered; that in making and accepting the proposal the two parties were not *ad idem*; that, therefore, there was no new contract creating a future tenancy, and accordingly the tenant was entitled to fix the fair rent of T., and was liable in use and occupation for the 10 acres, Irish, of M.

Semble, without resumption of possession by the landlord, a present tenancy may be determined by a surrender implied by reason of the tenant accepting a new estate inconsistent with such present tenancy.

Walker, C.

WALKER, C.—In this case the landlord has appealed from an order of the Land Commission, dated the 14th July, 1893, which affirmed an order of the Sub-Commission, fixing a fair rent.

It appears that Margaret Conroy was, on the 27th February, 1885, tenant from year to year, and a present

tenant, under the Act of 1881, of the lands of Teneille, containing 61 acres, 1 rood, 6 perches, Irish, equal to 99 acres, 1 rood, 3 perches, statute, the interest in which she had acquired from her husband, Thomas Conroy. The rent was £67 10s.

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Her husband had also been tenant, to the same landlord, of adjoining lands of Mullaghanard, containing 37 acres, 3 roods, 35 perches, statute, the interest in which, by some arrangement, passed after his death to his brother, Martin Conroy, who was evicted by the landlord, and possession taken up; and, on the 27th February, 1885, this farm was, at all events as regards 10 acres, Irish, in the landlord's hands. The rent of the entire farm of Mullaghanard had been £31 2s. 6d.

It was not suggested that the landlord ever in fact, got up possession of Teneille from Mrs. Conroy before or at the date of the agreement next stated. On the 27th February, 1895, Mrs. Conroy signed the following agreement:—

"I, Margaret Conroy, of Teneille, Rosenallis, Queen's County, hereby propose and agree to become tenant to the Most Noble Henry Francis Seymour, Marquis of Drogheda, for my old holding in Teneille, containing 61 acres, 1 rood, and 6 perches, Irish plantation measure, or thereabouts, together with 10 acres, Irish plantation measure, of the lands of Mullaghanard, or thereabouts, as one holding, from the 29th September, 1884 (four), at a yearly rent of seventy-five pounds, sterling, to be paid half-yearly, on every 25th March and 29th September in each year, the first half-yearly payment to be made on the 25th March, 1885 (five); and I also undertake to pay all county cess and other taxes as heretofore."

Mrs. Conroy forthwith paid the full rent of £75, and received receipts therefor.

On the 29th January, 1892, Mrs. Conroy filed an originating notice to fix a fair rent of all the lands

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in the agreement, the area being stated to be 113 acres, 1 rood, 22 perches, and the rent £75.

During the progress of the hearing before the Sub-Commission this notice was amended by striking out the portion representing Mullaghanard, and a fair rent of £54 was then fixed for Teneille. The landlord appealed upon the ground that the tenancy was a future one. No witness was examined on his behalf, and the tenant, Margaret Conroy, deposed that the agreement of the 27th February, 1885, was drawn up in the office of the agent, Mr. Harvey; that she had to sign it when she went with the rent; and that the clerk told her his orders were to take no rent unless she signed the agreement. The clerk read it. She told Mr. Harvey she would sign no lease or binding agreement, as the rent was too high at £72; and he said that had nothing to do with the fixing of the rent: it was only to take the land.

The case derives its importance mainly from the reasons on which Mr. Justice Bewley based his Judgment. He says:—

“Prior to the passing of the Land Act of 1881 there would have been a surrender of the old interest in the 61 acres, and the creation of a new tenancy in the enlarged holding. However, having regard to the terms of the 20th section, it now appears to be the law that a tenancy to which the Act applies can only be deemed to be determined whenever the landlord has resumed possession of the holding, and that without the resumption of possession there is no determination of the tenancy, either by notice to quit or by what otherwise would be equivalent to surrender by operation of law. That was decided by us in the case of *Jackson v. Hagan* (1). The same principle was laid down by the Court of Appeal in *M'Donnell v. Blake* (2), and also in *Montgomery v. O'Hara* (3). Under these circumstances we think the old tenancy in this portion of the holding has not been determined.”

Neither in *M'Donnell v. Blake* (2) nor *Montgomery v. O'Hara* (3) had the Court to deal with the implied surrender arising from the taking by the tenant from the landlord of an inconsistent estate; and as the Judgment of Mr. Justice Bewley is based mainly upon the language of the Lord Chief Baron, the true explanation of the *ratio decidendi* in *M'Donnell v. Blake* (1) will come more appropriately from him.

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Can it be that the 20th section has the effect of putting an end, in the case of every tenancy to which the Act applies, to the doctrine of implied surrender and surrender by operation of law—so important a branch of our real property system? Section 7 of the Act of 1860 is an enactment *in pari materia* with that which we are considering; and it distinctly recognises surrender by operation of law as valid:—"The estate or interest of any tenant under any lease or other contract shall not be surrendered otherwise than by a deed executed, or note in writing, signed by the tenant or his agent thereto lawfully authorized in writing, or by act and operation of law."

In my opinion the doctrine of implied surrender is not destroyed by the Act of 1881, in tenancies to which that statute applies. There is no express enactment that it is not to be given effect to. On the contrary, I find mentioned in section 7 and section 20, sub-section 1, cases of surrender which would probably be implied surrenders or surrenders by operation of law; and they are only mentioned for the purpose of directing that they are not to injure the position of a tenant who derives his title through them.

Section 20 is obscure and ungrammatical as regards the words "or by operation of law;" and it is to be observed that it contains affirmative legislation, not negative.

Take the case of a tenant who for the highest consideration applies for and accepts a new lease at half

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his old rent : is the old tenancy subsisting and unaffected? and has *Lyon v. Reed* (2) no application? Such a result might be disastrous to the tenant.

I do not think anything in the 20th section applies to a case where the determination of the tenancy arises from the action of estates *inter se*—the acceptance by the tenant of an inconsistent estate—and constructive possession attributed to the landlord for the purpose of their dealing. Apart, therefore, from the special facts of this case, I think the tenant would fail. I do not consider it necessary to express an opinion on other provisions of the 20th section on which questions may hereafter arise. In the present case, however, it seems to me impossible to say that there was any surrender of Mrs. Conroy's present tenancy made or intended. Surrender depends on intention. According to her evidence, the agent made statements to her which conveyed to her that nothing of the kind was intended on the landlord's part. Then, look at the document itself. The words "my old holding," together with 10 acres added, would convey that her *status* as regards the "old holding" would remain the same as before, and the last words in the agreement, "all county cess and other taxes as heretofore," would be calculated to leave on her mind the impression that there was no disturbance of her *status*. The agent does not contradict her evidence, and I accept it as true. No Court would enforce against this woman a performance of this document in the sense that it would make her a future tenant of all. On the other hand, she had no right to fix a fair rent for both holdings; because I have no doubt she would at best be but a future tenant for the 10 acres added by the agreement of February of 1885.

The originating notice, however, has been amended in the Court below; and finding that amendment made, and the case having proceeded upon it, we shall deal with the case on that footing, and I think her rights in

respect of the holding of Teneille must be treated as still subsisting. Mrs. Conroy is liable to Lord Drogheda for the value of her use and occupation of that additional land ; but it is to be distinctly understood that our order only affirms her right to fix a fair rent of Teneille, leaving quite free the rights of the landlord as to the 10 acres consequent upon her repudiation of the agreement of the 27th February, 1885, as a whole ; and we shall, by our order, guard the rights of the parties in this respect. The appeal will be dismissed, with costs.

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FITZGIBBON, L.J.—Since 1885, under the belief that a new arrangement had been made by contract, the parties have been acting, in our opinion, under a misunderstanding. The legal effect, subject to any equitable conditions which might be necessary, is to leave Mrs. Conroy tenant under her old tenancy of Teneille, and to render her liable to the landlord in use and occupation for the 10 acres of Mullaghanard, which she beneficially occupied upon terms not mutually agreed upon. We consider that she is a present tenant in her holding in Teneille, and is, therefore, entitled to fix a fair rent in respect of it. But as she is in possession of the 10 acres of Mullaghanard under a misunderstanding only, we consider that she is merely permissive tenant of this portion of land, and, therefore, not entitled to fix a fair rent for it ; on the contrary, on the misunderstanding being shown, and no new bargain made, the landlord can take up the possession, discharged from any tenancy from year to year. No doubt, the tenant served an originating notice apparently affirming the proposal of 1885, and relying on it as giving her the rights of a present tenant in both these parcels of land. But this was met by the landlord's showing that she was never a "present tenant" under that proposal, to which the tenant rejoins that she never intended to surrender her present tenancy in Teneille, and so the absence of any contract is proved. Possibly, as a rule, it might be

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in the interests of justice for the Court below to dismiss rather than to amend an originating notice that asserts a tenancy that does not exist, leaving the true case to be made in a new proceeding. But this is a question of mere procedure ; and I am willing to regard this case as having been dealt with by the Land Commission, and to deal with it here, as one based upon an originating notice which has been so amended as to deal with the original present tenancy in Teneille only. It is plain from the evidence that the tenant never intended to surrender her "old holding" in Teneille. Her evidence is uncontradicted, and every presumption is in her favour. The document was prepared by the landlord's representative ; the tenant had no independent advice. I think the meaning of the whole transaction was to alter the amount of land the tenant had, and to put the two lots, Teneille, and the 10 acres of Mullaghanard, into one holding, subject to a lump rent, so that, except as to rent, the tenant's rights as to Teneille should remain the same, and the little bit of land in Mullaghanard was to be "thrown in," as it were, with Teneille. If I were not a lawyer, but only a tenant in Mrs. Conroy's position, I should never have understood anything else from the terms of the document. Mrs. Conroy surely never thought she was surrendering her land, or altering her *status*, when she signed an agreement containing the words : "I propose and agree to become tenant of *my own holding* in Teneille, *together with 10 acres* of Mullaghanard ; . . . and I also undertake to pay all county cess and other taxes *as heretofore*." I do not like to put the alternative that it was present to the mind of the landlord's representative that Mrs. Conroy's signature would put an end to her present tenancy in Teneille. I do not believe either party thought of altering Mrs. Conroy's statutory rights. It is not possible now to attach those rights to the Mullaghanard holding, and nothing has happened to make

it inequitable still to maintain them as to Teneille. Therefore, according to my view, Mrs. Conroy has been in possession of Teneille all along under her old tenancy, and of Mullaghanard under a misunderstanding; and she can fix a fair rent *for* Teneille, but is liable in use and occupation for Mullaghanard.

The case is to be determined under the Common Law, and not on the construction of the Act of 1881, section 20. But that section has been so much discussed that I think it right to say a few words upon it. It is one of those provisions found all through the Land Acts which compel us to recognise things which, apart from these enactments, have no legal existence. For instance, we are not unfamiliar with that legal chimera, a tenancy from year to year which we are to deem to be still subsisting, though a notice to quit has been served, and has been followed by a demand of possession; similarly, a tenancy is to be deemed still subsisting for the purposes of the Act, though the lands are under eviction for non-payment of rent. The germ of this style of legislation is to be found in the definition of "tenant" in the Act of 1870, s. 70, which enacts that a man *shall be deemed to be a tenant notwithstanding the determination or expiration of his tenancy*, until the compensation due to him under the Act has been paid or deposited. As at present advised, I think effect may be given to section 20 of the Act of 1881, by applying it to those creations of the Legislature, and as providing when they shall come to end. It seems to me that the section means that whenever the landlord has resumed possession, there is to be an end of every tenancy legally existing, or hypothetically deemed to exist, to which the Act applies. But the section is affirmative only; it does not say that no tenancy to which the Act applies shall be determined unless or until the possession has been resumed by the landlord. I shrink from a decision which would leave

Appeal.
February 24,
1894.

Conroy
v.
Drogheda.

FitzGibbon,
L.J.

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February 24,
1894.

Conroy
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Drogheda.

FitzGibbon,
L.J.

it open to either landlord or tenant, years after a new contract of tenancy had been made and acted on, to turn round upon the other party, and either to claim the rent, or to assert the rights incident to a surrendered "present tenancy," upon the ground that by neglect, or even by arrangement, the tenant's possession had not been disturbed. It is to be remembered that the resumption of possession for the purpose of re-letting would be only a form; and further, that section 20 itself, in sub-section 1, mentions surrender "for the purpose of the acceptance or admission of a tenant, or otherwise by way of transfer," which were rarely accompanied by resumption of the possession by the landlord, and makes them the subject of an express proviso that they shall not "be deemed to be a determination of the tenancy."

Palles, C.B., in a lengthened Judgment, concurred.—
I.L.R., vol. ii., 1894, p. 590.

Queen's Bench
Division.
April 24, 30,
1894.

QUEEN'S BENCH DIVISION.

(Before HARRISON, JOHNSON, and HOLMES, JJ.)

Johnson v. Egan.

Land Law (Ireland) Act, 1887—Leases—Sub-letting—Application.

A lessee, whose lease contained no covenant restraining sub-letting, served an originating notice under section 1 of the Land Law (Ireland) Act, 1887, to be deemed a present tenant, and to have a fair rent fixed, and afterwards made a sub-letting. Subsequently the Land Commission made an order that he be deemed a tenant of a present ordinary tenancy, and fixed a fair rent.

Held, that the sub-letting was lawful. *Smith v. Moore*, 32 I.L.R. I., 129, followed. *Semble*, that a lessee serving

an originating notice, under section I of the Land Law (Ireland) Act, 1887, does not acquire the *status* of a present tenant until the hearing by the Court of the application, so as to invalidate a sub-tenancy created in the interval between the serving of the notice and the hearing.—I.R., vol. ii., 480.

Queen's Bench
Division.
April 24, 30,
1894.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
November 5,
1894.

(Before WALKER, C., and FITZGIBBON and BARRY,
L.JJ.)

Roulston v. Caldwell and Cust.

Land Law (Ireland) Act, 1881—Present tenancy subsisting at the passing of the Act—Mortgage by owner in fee—Lease by mortgagor after the mortgage, but before 1881, without consent of mortgagee—Payment of rent by lessee to mortgagee—Recognition of lease by mortgagee.

A. H., being seized in fee of lands in the County of D., mortgaged the lands in 1874 in fee to C. On the 30th October, 1892, W. H., the successor in title of A. H., made a lease of the lands to J. R. for ten years, at a rent of £131, the mortgagees not being parties to the lease, nor assenting to it. On the 1st November, 1884, the mortgagees gave notice to R. not to pay the rent due under the lease, or any future rent to the landlord, and on the 18th April, 1885, they demanded payment from J. R. of the half-year's rent due on the 1st November previous, and also required the future rent to be paid to them. Some further correspondence passed between the mortgagees and J. R., in which the parties treated with each other on the basis that the lease was subsisting. On the

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29th October, 1890, J. R. served a notice to fix a fair rent. The Sub-Commission (Greer, A.L.C.) fixed the fair rent at £108. The Land Commission, reversing the decision of the Sub-Commission, held that J. R. was not a present tenant at the passing of the Act of 1881.

Held (reversing the decision of the Land Commission), that the mortgagees had shown an intention to deal with the lessee as holding under a lease, and that he was entitled to a present tenancy existing at the passing of the Act of 1881.

Walker, C.

WALKER, C.—This case involves no dispute as to the facts. Alexander Hamilton, who was seized in fee of the lands in question, by deed dated the 8th December, 1874, mortgaged them to Caldwell and Cust, the respondents in fee. The equity of redemption subsequently vested in William Hamilton, and on the 30th October, 1880, he being left in undisturbed possession and apparent ownership of the lands, made a lease to Joseph Roulston, the present appellant. By this lease William Hamilton demised to Roulston the lands in question, to hold for a term of ten years from the 1st November, 1880, at the yearly rent of £131, the first half-year's rent to be paid on the 1st May, 1881, and the second on the 1st November, 1881. This lease contained the usual clauses in leases between landlord and tenant, and covenants against assigning and sub-letting, and a clause prohibiting all claim for disturbance or improvements under the Act of 1870, or any Act amending the same, also a clause for re-entry for breach of covenants. On the 1st November, 1884, the solicitors for Caldwell and Cust, the mortgagees, wrote to Roulston as follows :—(His Lordship read the correspondence between the parties.) I read these letters as an equivalent to an arrangement between the now respondents and Roulston, that he should for all purposes become their tenant, with all the rights and liabilities which the contract of tenancy created, and all

the incidents attached to the subsisting tenancy, and for ten years the parties have acted on that basis. One of the incidents as between Hamilton and Roulston was a right to fix a fair rent at the expiration of his lease on the 1st November, 1890. This valuable incident depended on the date of the commencement of the tenancy and its expiration. It would have become an immediate right when the Act of 1887 passed. The originating notice is dated the 29th October, 1890, and was served almost contemporaneously with the expiration of the period of ten years fixed by the lease of 1880. The Sub-Commission fixed a fair rent, but the case was dismissed by the Head Commission, on the ground that a new tenancy had been created after the 1st January, 1883, and that no present tenancy existed in respect of which a fair rent could be fixed. The lease was in any event at an end long before the case was heard by the Sub-Commission. I think that the case of *Evans v. Elliot* (1), adopted in *Towerson v. Jackson* (2), establishes that, to create the relation of landlord and tenant between a mortgagee and the tenant of the mortgagor, express contract is necessary, and not merely the service of a notice to pay rent, and payment after by the tenant.

I also consider that the case of *Gladman v. Plumer* (3) is an authority that direct express contract may carry back the relation of landlord and tenant to any agreed time. I infer from the documents here and the acts of the parties an express contract that Roulston shall be tenant to the mortgagees for all the purposes and on all the terms of the lease, with all its incidents. Roulston had a present tenancy subsisting at the passing of the Act of 1881, and he was in possession and occupation under it. There was, therefore, an existing *status*. I think it was competent to adopt it, and it was adopted for the highest considerations. In a country circumstanced like ours it would be a serious proposition if this

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November 5,
1894.

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Walker, C.

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were impossible. I do not think the tenancy is one "created" within the meaning of *Howell v. Briscoe* (4).

Upon the whole, I think that the law of the case can be reconciled with its justice, and the acts and intentions of the parties, and, therefore, that the decision of the Land Commission should be reversed, and the case remitted to fix a fair rent.

FitzGibbon and Barry, L.JJ., concurred.—I.R., 1895, vol. ii., 136.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Case stated.
June 7, 11,
1895.

(Before WALKER, C., FITZGIBBON and BARRY, L.JJ.)

Fitzsimmons v. Ellis.

*Land Laws—Surrender of a tenancy existing in 1881—
Re-letting of a portion of same before Jan. 1, 1883—
Present tenancy—"Holding."*

Where a tenancy in a holding of 14 acres, Irish (held under a lease for the life of the lessee), was surrendered in 1882 by his widow, some years after the death of the lessee, and the landlord divided the holding into three separate parts, and re-let them in November, 1882.

Held, that the tenancy in one portion so re-let was a present tenancy under section 57 of the Act of 1881.

Case stated on application to fix a fair rent.

J. Hopewell held 23 acres, 3 roods, 33 perches, statute measure, on lease for a term of twenty-one years, at £27 15s. 6d. rent. He died in 1876, and his widow, Mrs. Elizabeth Hopewell, who paid the rent, continued in occupation after his death till 11th April, 1882; she

then surrendered the holding to the landlord. The landlord in May, 1882, subdivided the farm, gave the widow a house and 10 statute acres, at 10s. yearly rent for her life, and let the rest in three lots to a Mr. Greir—one lot of $4\frac{1}{2}$ acres, statute measure, at £22 10s. yearly rent; another, of 4 acres, 1 rood, 19 perches, statute measure, at £12 yearly rent; and the third, of 4 acres, 1 rood, 29 perches, statute measure, at £10 10s. yearly rent. Fitzsimmons bought the last two lots in January, 1890, and he served notice to fix a fair rent on the holdings. At the hearing the £12 holding was struck out. The Chief Land Commission held that the tenancy in the £10 10s. holding was a present tenancy (Act, 1881, section 57), but stated a case for the Court of Appeal. The question was, whether the tenancy in the holding now subsisting is a present tenancy.

Case stated.
June 7, 11,
1895.

Fitzsimmons
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WALKER, C.—It was argued that this piece of land could not fit in with the definition of “holding” and “present tenancy,” which means a tenancy subsisting or created before January 1st, 1883, in a holding in which a tenancy was then subsisting; because the thing on which the tenancy was created must be the *whole* holding. In my opinion, the exclusion of a part of the old holding does not prevent the definition applying. To hold that it did would involve the absurdity that if there was a letting of 100 acres subsisting in 1881, and that was surrendered to the landlord, he could not re-let 99 acres so as to become the subject-matter of a present tenancy. If the subject is once a present tenancy, the creation during the statutory interval of a tenancy in that subject, *or any part of it*, comes within the definition. “Holding” means a “parcel of land.” The question should be answered in the affirmative.

Walker, C.

FitzGibbon and Barry, L.JJ., concurred.

See Report, *Fitzsimmons v. Ellis* (No. 2), *post*, where it was subsequently held that the 4 acres, 1 rood, 19 perches, at £12, was a future and not a present

Case stated.
June 7, 11,
1895.

tenancy ; it there appearing that the landlord in 1882 was only tenant for life (and, therefore, could not bind his successor in title, the present landlord), which was apparently not brought under the notice of the Court of Appeal in the present case.

Sub-Com.
October 7,
1895.

SUB-COMMISSION.

(Before DOYLE, A.L.C.)

Carroll v. Burke.

Land Law (Ireland) Act, 1881, sections 8, 9, 14—Title Occupancy—"Tenant"—Notice of withdrawal.

Where rent receipts were given to the applicant "as the representative of the late P. C.," though he never took out administration to P. C., and was never acknowledged by the landlord as tenant, an application to dismiss the originating notice to fix a fair rent (which had been served after the death of P. C. intestate) was refused.

DOYLE, A.L.C.—This case is exactly similar to *Fox v. Langan*, and, though it was decided by the Exchequer Division, yet the Land Commission has invariably refused to follow it. As regards the notices of withdrawal, they were informal, and not accepted by the landlord ; and though I can give costs, yet in this case I do not think I will. I shall grant limited administration for the purpose of the Act, and allow a fair rent to be fixed.—I.L.T.R., vol. xxx., 52.

SUB-COMMISSION.

Sub-Com.
March,
1896.

(Before GREER, A.L.C.)

Watt v. Clanricarde.

Land Law (Ir.) Act, 1881, section 57—Present or future tenancy—Surrender.

A tenant, B., sub-let his holding to W. in 1876. In 1885 B. was ejected by the landlord, who—no habere having been issued—obtained formal possession from W., whom he then re-instated in the holding, less by a portion, at a reduced rent, which he since paid :

Held, to be a friendly proceeding not amounting to a surrender, and that the tenancy was a present one.

Application to fix a judicial rent. The area was 97 acres, 3 roods, and 20 perches; the rent, £70. According to the evidence it appeared that prior to the year 1876 this holding, together with another denomination of land known as the "Big Island," was held by one contract of tenancy under Lord Clanricarde, the then tenant being a person named Briscoe. In 1876 Briscoe sub-let the entire of his holding to the present tenant, Watt, at the yearly rent of £178 17s. 4d. The tenancy continued undisturbed down to the year 1885, when Lord Clanricarde served a notice to quit on Briscoe, which was followed by proceedings in ejectment in the superior courts, and judgment apparently having been obtained, the bailiff and coachman of the landlord visited the farm, and obtained formal possession of the holding from the tenant Watt. The tenant stated—and his evidence was not impeached or contradicted—that on that occasion (some time in the year 1885) the bailiff stated to him that the object of the proceeding was "to get rid

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1896.

Watt
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of Briscoe as tenant and give the holding to him," and consistent with that representation the bailiff then and there re-instated Watt in the possession of the house and lands. On the occasion referred to the possession of the portion of the holding called the "Big Island" was not given to the present tenant, and so far as could be ascertained no reference whatever was made to it. No rent was paid by the tenant for two years thereafter; the island portion apparently being the subject of negotiation and dispute, and in 1887, on the appointment of a new agent, it was arranged that Watt's rent for the holding, *ex* the "Big Island," should be £70 per annum, and accordingly he paid to the agent two years' arrears of rent estimated at that rate, and he had since continued tenant of the holding.

Greer, A.L.C.

GREER, A.L.C.—This application was heard in Galway. I have considered the legal points put forward by Mr. Graham, solicitor for the landlord, and I do not see any reason for holding over my decision. Mr. Graham contended that the tenancy of Briscoe was determined by the proceedings in ejectment and the surrender of the possession in the year 1885, when a new and future tenancy was created between Watt and the landlord. I cannot adopt that view of this case. The tenancy here is, no doubt, a tenancy created after the 1st of January, 1883; but, if so, it is a tenancy in a holding in which a tenancy was subsisting at the time of the passing of the Land Act of 1881. What took place in 1885 under the ejectment proceeding we unanimously regard as a friendly proceeding, instituted to clear the tenancy of Briscoe and transfer it to Watt, who was then accepted as tenant of the diminished area of the holding at the lesser rent of £70, which he has since paid. No evidence was given of an *habere* having been issued, or the sheriff's services having been invoked, and there was no eviction such as might under other circumstances

have put an end to the existing tenancy in the holding. If a surrender of the tenancy of Watt was then contemplated by the landlord and his advisers, the tenant, who was without any legal assistance, clearly did not understand that he was relinquishing any rights which the Land Act conferred upon him. We are satisfied that he never intended that his *status* should be affected by his formally walking out of his house and walking into it again ; and upon every principle of equity I decline to hold that what then took place amounted to a surrender of the tenancy. Neither the alteration of the rent (see *Inchiquin v. Lyons*, 20 L.R.I., 470) nor the alteration of the area of the holding (see *Curoe v. Gordon*, 26 I.L.T.R., 95) created a future tenancy in the holding ; and, that being the conclusion at which I have arrived, a judicial rent will be fixed.—I.L.T.R., xxx., 128.

Sub-Com.
March,
1896.

Watt
v.
Clanricarde.

SUB-COMMISSION.

Sub-Com.
November,
1896.

(Before BAILEY, A.L.C.)

Ferris v. Trustees Thompson.

Present tenant—Determination of estate of immediate landlord—Land Law (Ireland) Act, 1896, sections 12, 50 (2)—Land Law (Ireland) Act, 1881, section 15.

A tenant whose immediate landlord was evicted for non-payment of rent in 1889, and who thereupon attorned to the superior landlord :

Held, to be a present tenant within the meaning of section 15 of the Act of 1881 by virtue of sections 12 and 50 of the Act of 1896.

In this case an application was made to have a fair rent fixed for a second statutory term. When the first

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1896.

Ferris
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Trustees
Thompson.

judicial rent was fixed, Dowdall, a middleman, was the immediate landlord. He fell into arrears, and was evicted for non-payment of rent to November, 1889. All his sub-tenants were named as defendants in the ejectment; and when possession was taken by the sheriff, they signed attornments, and were put back into possession at the judicial rents. The question now arose, Were they present or future tenants?

Bailey, A.L.C.

BAILEY, A.L.C.—Section 12 of the Act of 1896 enacts that “where a superior landlord recovers against an immediate landlord a judgment in ejectment for non-payment of the rent of a holding, the estate of the immediate landlord shall be deemed to be determined within the meaning of section 15 of the Land Law (Ireland) Act, 1881;” that is, that the superior landlord is to have the rights and be subject to the obligations of the immediate landlord with respect to the tenant of the tenancy. Mr. H. Moore, on behalf of the landlord, raises the point that this section is not retrospective, and consequently cannot apply to the case before us. As the section stands, it undoubtedly would appear not to be retrospective. It contains certain provisions which are to govern its operation, and which, of course, could only be brought into operation in cases that arise subsequent to the passing of the Act. Section 50, sub-section 2, of the Act, however, provides that “where a tenant would, if this Act had been in force at the passing of the Land Law (Ireland) Act, 1881, be now a present tenant, and either the landlord has not, since the passing of the said Act, or the 31st day of December, 1882, as the case may be, resumed possession of the holding, or if he resumed the tenant has redeemed or being reinstated in his former tenancy, the tenant shall be deemed a present tenant.” Now, it is evident that if section 12 of the Act had been part of the Act of 1881, the tenant before us would, on the eviction of his immediate landlord—the middleman—

have become tenant under the superior landlord without any break in his tenancy. The effect of section 50 is to make section 12 operate as if it were retrospective. We must accordingly hold that Ferris is the tenant of a present tenancy, and entitled to have a fair rent fixed for a second statutory term.—I.L.T.R., xxx., 147.

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November,
1896.

LAND COMMISSION.

Land Com.
November 10,
1896.

(Before BEWLEY, J., FITZGERALD, Q.C., and O'BRIEN,
Commissioners.)

Conlan v. Campbell.

Tenancy created in the month of March, 1891, in succession in a tenancy previously existing not a future tenancy, section 20, Land Law (Ireland) Act, 1881.

The facts appear in the Judgment.

BEWLEY, J.—In this case it was contended on behalf of the landlord that the tenancy was a future tenancy. The tenancy was, in fact, apparently created in the month of March, 1891, under the following circumstances:—A prior tenant of the name of Laurence M'Ardle had fallen into arrear in his rent, and proceedings had been taken or were about being taken to evict him. Under these circumstances an arrangement was come to that Bryan Conlan should pay £7 7s. for the arrears of rent due by M'Ardle, and should go into possession of the holding on the same terms, paying the rent then payable by M'Ardle of £3 13s. 6d. a-year. The seven guineas were paid accordingly on June 2nd, 1891, by Bryan Conlan, who received a receipt for the same as for arrears due by the former tenant to the 25th

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November 10,
1896.

Conlan
v.
Campbell.

Bewley, J.

March of that year. Under these circumstances he (Judge Bewley) was clearly of opinion that the tenancy was not a future tenancy under the 20th section of the Land Law Act, 1881—"A tenancy to which the Act applies shall be deemed to have determined when the landlord has resumed possession"—with a proviso that "a surrender to the landlord of the tenancy for the purpose of acceptance or admission of a tenant or otherwise by way of transfer to a tenant shall not be deemed to be a determination of the tenancy." Under the law existing before the passing of the Act of 1881 the effect of the transaction he had stated would have been that after Bryan Conlan went into possession and paid rent there would have been a surrender by operation of law of the original tenancy of M'Ardle, and the creation of a new tenancy in Bryan Conlan. Under the sub-section he had referred to, one of the main objects of the transaction was merely to transfer the tenancy from one to another. No determination of the present tenancy took place. They were, therefore, of opinion that this point had not been sustained, and that the rent should be fixed.

Land Com.
February 11,
1896.

LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Good v. Levis.

*Land Law (Ireland) Acts, 1881 and 1887—Rule 115—
Fair rent fixed by agreement—Attesting witness—
Filing.*

A Bank manager is a competent witness to an agreement fixing a fair rent, as he is not in the landlord's employment merely because the landlord keeps an account at his Bank.—I.L.T.R., vol. xxx., 52.

LAND COMMISSION.

Land Com.
November 4,
1896.(Before BEWLEY, J., FITZGERALD, Q.C., and WRENCH,
Commissioners.)**Cunningham v. Cope.**

*Land Law (Ireland) Act, 1896, section 1, sub-section 1—
Application to ascertain and record particulars enu-
merated in section 1.*

BEWLEY, J.—In this case an application was made to us on behalf of the landlord to ascertain and record in the form of a schedule the several matters referred to in section 1, sub-section 1, of the Land Act of 1896. In my opinion, however, the provisions of that sub-section are inapplicable. That statute provides that where the Court fixes a fair rent of the holding, the Court shall ascertain and record certain matters therein mentioned in the form of a schedule. In the present case the originating notice to fix a fair rent for a second statutory term was served on the 24th March, 1896, and a fair rent was fixed by a Sub-Commission on the 23rd June, 1896, nearly two months before the recent Land Act was passed. The first statutory term in the tenancy expired on the first of the present month, and the second statutory term and the new judicial rent then commenced to run. This Court may vary the existing judicial rent fixed by the Sub-Commission by either increasing it or reducing it; but whether increased or reduced, or affirmed, it will not, in my opinion, be fixed by this Court within the meaning of the section. I may observe, also, that several matters contained in the statutory form of schedule appended to the Act obviously point to the fixing of a fair rent by the Court in the first instance. This Court, no doubt, under the

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November 4,
1896.

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Cope.

Bewley, J.

jurisdiction given by sub-section 37, section 6, and sub-section 5, and section 48, of the Land Act of 1881, obtain the opinion of valuers on matters referred to them, and may act on that opinion; but I find nothing in the recent Land Act to suggest that the particulars of the holding taken into consideration in fixing the judicial rent involving matters of fact, and not merely matters of opinion, should be ascertained in any such manner. Although the present case was, in my opinion, a proceeding pending at the commencement of the Act, within the meaning of section 50, the event contemplated by section 1, sub-section 1, does not appear to me to have occurred. In section 3, sub-section 2, of the Act, the expression "where the Court on application fix a judicial rent" must necessarily refer to the fixing of the rent by the Court before whom the application comes in the first instance; and I think that the corresponding and almost identical expression in the 1st section must receive the same interpretation, and that the proper and only construction of section 1 is that the schedule referred to is to be prepared when the judicial rent is originally fixed, and not when it is merely varied or affirmed on a re-hearing. Any other construction, I may add, would lead to serious practical inconvenience. The application to frame a schedule cannot, therefore, be granted. The old rent in this case was £6, the new judicial rent £2 12s. 6d., and we now fix it at £3 5s.

On the application of Mr. Harris, for the landlord the Court granted a case stated for the opinion of the Court of Appeal.

SUB-COMMISSION.

Sub-Com.
January 12,
1897.

(Before W. F. BAILEY, A.L.C.)

Smart v. Jones.

Where a tenant served an originating notice to have a fair rent fixed on the first occasion on which the Court sat in 1881, and subsequently withdrew that notice, in order that the holding might be divided into two separate tenancies, for each of which agreements and declarations fixing fair rents were filed, the tenant of one of these tenancies is now entitled to apply to have a judicial rent fixed for a second statutory term by virtue of section 4 of the Land Act of 1896.

BAILEY, A.L.C.—The tenant applies to have a fair rent fixed. She holds under an agreement and declaration fixing a fair rent entered into on the 26th September, 1883. Mr. M'Clelland, on behalf of the landlord, contends that the application is premature, and should be dismissed, as the statutory term of fifteen years has not yet expired. It would appear that this farm, which consists of 4 acres, 3 roods, 22 perches, in the year 1881 was part of a larger holding of about 10 acres, which was in the possession of two persons, each of whom occupied a separate portion. An originating notice to have a fair rent fixed was lodged on the first occasion on which the Court of the Land Commission sat, and was duly recorded. When the application to have the rent fixed came on for hearing before the Sub-Commission Court, it was ruled that one rent should be fixed on the two tenants. This the tenants objected to, each desiring to have a separate rent fixed on his own part. To satisfy them the agent appears to have offered to enter into an agreement out of Court with each at a

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rent for his part, and the recorded originating notice was accordingly not proceeded with. The question now is, Does the case come within the 4th section of the Act of 1896, which provides that where a tenant applied to have a fair rent fixed on the first occasion on which the Court sat in 1881, and subsequently signed an agreement fixing a judicial rent, the statutory term so created shall, where the judicial rent was treated as accruing due from the gale day next after the passing of the Act of 1881, be held, for the purpose of an application to fix a fair rent, to date from that gale day? The present case comes within the section, as the judicial rent was paid from the gale day in 1881. The only question that has to be considered is, Must the holding now seeking the shelter of section 4 of the Act of 1896 be the same holding as that for which the application was made and recorded in 1881? I am of opinion that the provisions of section 4 of the Act of 1896 will be satisfied where the holding for which the agreement was entered into was part of the holding for which the application was made and recorded in 1881. We accordingly hold that the tenant is now entitled to apply to have a second statutory term and another judicial rent fixed.

[Not reported.]

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1892.

LAND COMMISSION.

(Before BEWLEY, J.)

Peacocke v. Christle.

Redemption of Rent (Ireland) Act, 1881—'Grantee under a fee-farm grant'—Rent-charge.

Application on the part of the grantors that the originating notice served by the grantee under the Redemption Act, should be set aside, on the ground that the deed (1879) was not a fee-farm grant within section 1 of the Act

BEWLEY, J. (after stating the contents of the deed, and considering in detail the provisions of the Redemption of Rent Act)—*Held*, that in order to maintain an application to redeem, the applicant must establish that (1) he is in *bonâ fide* occupation of a *holding* to which Part I. of the Act of 1881 applies; that (2) he is a grantee under a fee-farm grant within the meaning of the 1st section of the Redemption of Rent Act; and (3) that he holds at a full agricultural rent. It could not be contended that the deed of 1879 created the relation of landlord and tenant. The yearly rent-charge of £45 was a mere rent-charge created under the Statute of Uses, and not a rent service arising from tenure or contract. A fee-farm grant at common law was a grant in fee-simple, made by a mesne lord, subject to a perpetual rent service, as explained by Mr. Hargreave in his Notes to *Coke upon Littleton*, 143*b*. Though such grants were invalid in England after *Quia Emptores*, such was not the case in Ireland. Numerous fee-farm grants, in the strictest sense of the word, were to be met with in Ireland long subsequent to the time when the statute *Quia Emptores* was extended to this country. Under various Acts of the Irish Parliament, and grants from the Crown, which are noticed in Furlong's *Landlord and Tenant*, p. 15 (ed. Latouche), holdings in fee-farm were extensively granted; and the Renewable Leasehold Conversion Act of 1850, the Landlord and Tenant Act, 1860, and other statutes, enabled a large number of others to be legally made. In all these cases the relation of landlord and tenant was created, and the rent reserved was a rent service, including, in that designation, rents reserved under contracts of letting made since the passing of the Landlord and Tenant Act, 1860. It was unnecessary to express any opinion as to whether grants in fee, reserving a perpetual yearly rent in the way of *redendum*, in the interval between the introduction of *Quia Emptores* into Ireland and the Act

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of 1860, and not authorized by a statute or a Crown grant, might or might not come within the Redemption of Rent Act. The grant in the present case was in form and substance a purchase deed, and did not create the relation of landlord and tenant. The lands were not a "holding," which is defined in section 57 of the Act of 1881 as "a parcel of land held by a tenant of a landlord," nor did the grantee hold "at a rent." If the grantee's contention were to prevail, rent-charges issuing out of estates in fee might be redeemed if the other conditions prescribed by the statute existed; while no similar right of redemption would exist if the rent-charge issued out of a term of years, however long. The whole frame of the Act showed that, like the other Acts with which it is to be read and construed, it was intended to apply to cases in which the relation of landlord and tenant existed, and, in default of redemption, the lessee or grantee might properly be held to be a tenant of a present tenancy. The Act was merely supplementary to the Land Acts of 1881 and 1887, and the Land Purchase Act. A comparison of the 1st and 2nd sections showed that the distinction between a rent service resembling a head-rent and a rent-charge was not disregarded. Originating notice set aside with costs.—I.L.T.R., xxvi, 120.

SUB-COMMISSION.

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October 21
1892.

(Before BAILEY, A.L.C.)

Poynton v Smyth.

*Redemption of Rent (Ir.) Act, 1891—Payment of fine—
Estimate of allowance on account of.*

The facts appear from the Judgment.

BAILEY, A.L.C.—The lease under which the tenant holds was made March 1st, 1858, for a term of 999 years, at a rent of £27. The previous rent was £20, which was raised at the granting of the lease, and a fine of £118 was at the same time paid to the landlord. As I have stated in the case of *Gault v. Wilson* (26 I.L.T. & S.J., 432), I am of opinion that in these redemption of rent cases we should consider the fine paid at the taking out of the lease as part purchase of the interest in the holding. The method in which I think the calculation should be worked out, showing the actual share to which the tenant is entitled, ought, I think, to be clearly explained, so that the parties may have no difficulty in understanding our decision. The problem is to find the proportion of the value of the interest in the holding purchased by the payment of the fine, and then to subtract from the fair rent an amount equal to that proportion. We must regard the rent paid under the lease as representing the value of the holding at the time the lease was made. That rent was £27. Capitalizing this at £4 per cent., we get a sum of £675; adding to this the £118 paid as a fine, we have the sum of £793, which we must regard as the value of the holding at the making of the lease. But of this sum of £793 the tenant owned £118, being 1 $\frac{1}{2}$ of the gross

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value of the holding. That proportion is the property of the tenant, and must be deducted from the fair rent. We think the rent of the holding should be £25. From this we deduct £3 15s. (or about 14), which represents the proportion of the fair rent which is the property of the tenant. This will leave the fair rent of the holding £21 5s.—I.L.T.R., vol. xxvi, 612.

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(Before BAILEY, A.L.C.)

Gormill v. Lyne.

Grant in perpetuity under Trinity College Leasing and Perpetuity Act, 1851—Relationship of landlord and tenant—Redemption of Rent (Ireland) Act, 1891.

Held, that a grant in perpetuity of lands held under a Trinity College lease, with a *toties quoties* covenant for renewal made in pursuance of the Trinity College, Dublin, Leasing and Perpetuity Act, 1851 (14 & 15 Vict., c. 128), is within the Redemption of Rent (Ireland) Act, 1891, and the grantee is entitled to have a fair rent fixed where the grantors do not consent to redeem the rent.—I.L.T.R., vol. xxviii., 44.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before WALKER, C., PALLES, C.B., and FITZGIBBON
and BARRY, L.JJ.)

Appeal.
June 18, 19, 27,
1894.

Adams v. Alexander.

Redemption of Rent (Ireland) Act, 1891—Fee-farm grant made in 1837—Church Temporalities Acts—Relation of landlord and tenant.

A lessee of certain lands under a lease containing a toties quoties covenant for renewal also held from his lessor in that lease certain other lands under a tenancy from year to year. The lessee became entitled under the Church Temporalities Acts to a grant in perpetuity of the leasehold lands, and he thereupon under the said Acts obtained from his lessor a grant in perpetuity of the lands comprised in the lease. This grant was made in the year 1837, and included beside the leasehold lands other lands of which the grantee had previously been tenant from year to year, reserving a bulk rent in respect of the entire of the lands, secured by a covenant for payment and a proviso for distress applicable to the whole.

Held (FitzGibbon, L.J., dissenting), that the owner of the grantee's interest was not entitled to the benefit of the Redemption of Rent (Ireland) Act, 1891, as no relation of landlord and tenant was created by the grant of 1837.

Semble, fee-farm grants made under the Church Temporalities Acts, or under the Renewable Leasehold Conversion Act, being fee-farm grants to which there is attached as a statutory incident the right to bring ejectment for non-payment of rent, and also fee-farm grants made since the Landlord and Tenant Act, 1860, create the relation of landlord and tenant for the purpose of enabling the grantee to claim the benefit of the Redemption of Rent (Ireland) Act, 1891.—I.R., 1895, vol. ii., 363.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Case stated.
March 6, 11,
1895.

(Before WALKER, C., PORTER, M.R., and FITZGIBBON
and BARRY, L.J.J.)

Cummlins v. St. Leger and Others.

Tenant of an undivided share of lands—"Parcel of land"—"*Holding*"—*Land Law (Ireland) Act, 1881* (44 & 45 *Vict., c. 49*), s. 57—*Redemption of Rent Act* (54 & 55 *Vict., c. 57*), s. 1.

The lessee of an undivided share of land is not the occupier of "a holding" within the meaning of the Redemption of Rent (Ir.) Act, 1891. Diss. Walker, C.

Decision of the Irish Land Commission reversed.

Case stated by the Irish Land Commission.

By lease dated the 15th May, 1710, Thomas Broderick, Alan Broderick, and St. John Broderick demised to Richard Bettesworth the lands of Ballydulea, in the county of Cork, containing 145 acres, 1 rood, 38 perches, for the term of 999 years, at a yearly rent of £40.

The lessee's interest became vested, as to eight undivided ninth shares thereof, in Thomas Mannix Cummins, and as to the remaining one undivided ninth in the Rev. William Henry Flemyng, as tenants in common.

By lease dated the 2nd April, 1878, the Rev. Wm. Henry Flemyng demised his one undivided ninth share to Thomas Mannix Cummins, for the term of 830 years, at the yearly rent of £40.

The interest of the Rev. William Henry Flemyng in the reversion became vested in Richard F. St. Leger, W. H. Maunsell, H. M. Maunsell, and H. H. F. Maunsell.

Since 1878 Thomas Mannix Cummins was in *bond fide* occupation of the whole of the premises demised by the lease of the 15th May, 1710.

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March 6, 11,
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On the 24th February, 1892, T. M. Cummins served an originating notice on Richard F. St. Leger, W. H. Maunsell, H. M. Maunsell, and H. H. F. Maunsell as lessors, under the Redemption of Rent Act, 1891, to redeem the rent, or, in the alternative, to have a fair rent fixed, describing the lands as one undivided ninth of 145 acres, 1 rood, 39 perches of the lands of Ballydulea, in the County of Cork, which were held under a lease dated the 2nd April, 1879, from the Rev. W. H. Flemyng to the said T. M. Cummins for the term of 830 years, at the rent of £40.

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The lessors not having given the prescribed consent to the redemption of the said rent, the application to fix a fair rent came on to be heard before a Sub-Commission; and an order was made on the 25th July, 1893, fixing the fair rent at £22 2s. 6d. On appeal to the Land Commission this ruling was affirmed by order dated the 9th June, 1894.

PORTER, M.R.—I regret that I have not been able to come to the same conclusion as the Lord Chancellor, or to hold that an undivided ninth of leasehold premises, which is the subject of the present litigation, is within the Land Law Act of 1881, or the Redemption of Rent Act. I found my opinion on the definition of “holding” given in the Act of 1881. I agree with the Lord Chancellor that no light is thrown upon the question by the Act of 1860, because that was a codifying statute, applying to all tenancies, agricultural or otherwise. Again, as to the Act of 1870, I think it right to abstain from expressing any opinion whether an undivided portion of a holding is within that Act or not, for the purpose of supporting a claim for disturbance or improvements. It is a difficult question, and may come up for decision at some future time, and I think it

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would be wrong to prejudice it, as my opinion in the present case in no way depends upon it. It has not come up during the twenty-five years the statute has been in force, and it is not, therefore, likely to be of much practical importance. But as to the Act of 1881, it is, no doubt, to be considered an Act *in pari materia* with the Act of 1870. But when you find the more recent Act containing a definition of a word which had been used in the older Act without definition, we cannot expand the definition under the later Act by any construction which might possibly have been put upon the word in the earlier one. Therefore, whether or not the word "holding" in the Act of 1870 will include an undivided portion of land not held in severalty, we find a definition in the Act of 1881, which must have been introduced for some purpose. "Holding" in the Act of 1870 means something corporeal; it means the land itself. But the Act does not specify whether it must be held in severalty or in common with others. But in the Act of 1881 "holding" means a "parcel of land." Mr. Ronan's strongest argument was: Why should an undivided interest not be a "holding" within this Act? I cannot give any answer, but simply that it is not. "Holding, during the continuance of a tenancy, means a parcel of land held by a tenant of a landlord for the same term and under the same contract of tenancy." What is the meaning of "parcel of land"? There are some words so plain as to be difficult of definition; they must be paraphrased, but you cannot define them. A "parcel" of land means something parcelled out, set apart, partitioned off—a portion of land separate and distinct from all other land—but it does not mean an undivided portion, which cannot be pointed out, and which has no existence as a separate thing. Language as clear as that of this definition might have to be explained away if there were a context showing that the literal meaning of the words was inconsistent with

the general provisions of the Act, so that the particular term could not be used in its strict sense. But though we have been referred to a great many sections, not one of them shows that an undivided portion must necessarily be a holding in the sense used by the Act. On the contrary, a great many of them show that such a meaning could not have been contemplated, and they are indeed incompatible with any such idea. There are the provisions in section 2 as to sub-letting, the provisions in section 5 as to dilapidations of buildings, deterioration of soil, the erection of a dwelling-house, and so on. Then there is a power to the landlord to enter for the purpose of quarrying or of cutting timber. How can a landlord enter, quarry, or cut timber upon an undivided ninth? This is not conclusive, but it shows the inconsistency with the general tenor of the Act of the contention of the respondent here. This section obviously contemplates land held in severalty. Hunting, shooting, or fishing could not be exercised on an undivided ninth; and resumption by the landlord for the purposes of building, etc., is inconsistent with the nature of land so held. There may be and are many holdings where there are no quarries or timber; but that is a physical fact. In the present case the entire property may be fit for working quarries and cutting timber, yet the nature of the tenure prevents the landlord from doing either upon the undivided share of it.

For these reasons, the Legislature having given us this definition, we are bound to give effect to it; and I am of opinion that this holding is not within the Act. As the Lord Chancellor has pointed out, the case itself is not likely to be of great importance, except to the parties in the present litigation; and in any case, where the question might hereafter arise, it may easily be avoided by a partition.

FitzGibbon and Barry, L.JJ., concurred.—I.R., 1896, vol. ii., 603.

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SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Sheridan v. Nesblitt.

Land Laws—Renewable Leasehold Conversion Act (Ireland), 1849, section 37—Redemption of Rent (Ireland) Act, 1891.

By the 37th section of the Renewable Leasehold Conversion Act (Ireland), 1849 (12 & 13 Vict., c. 105), it is provided that every lease of lands in Ireland for one or more lives, with or without a term of years, or for years determinable upon one or more life or lives, or for years absolute with a covenant or agreement for perpetual renewal, made after the passing of that Act, by any person competent to convey an estate of inheritance in fee-simple (and not so made in pursuance of a covenant or agreement entered into before the passing of the Act), shall, notwithstanding anything therein contained to the contrary, be deemed to be and shall operate as a conveyance of the lands specified therein to the intended lessee, his heirs, and assigns, for ever, at a fee-farm rent equal to the rent expressed to be reserved in such lease, and that all reservation of a fine or fines upon or fees for or in respect of such renewal shall be altogether void. Lands were demised by a lease, dated the 9th June, 1841, for a term of 150 years, from the 29th September, 1837. In the year 1860 the owner of the lessee's interest, being desirous of obtaining a perpetual interest in the lands, agreed to give the landlord £100 as a fine for a new lease for lives renewable for ever, and accordingly by a lease under seal, dated the 9th June, 1860, the landlord executed a new lease of the lands for three lives, which contained a covenant for

perpetual renewal and covenants for payment of the rent, and provisions for distress and re-entry on non-payment of the rent.

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Held, that the lessee under this last-mentioned lease was entitled to have his rent redeemed under the Redemption of Rent (Ireland) Act, 1891.—I.L.T.R., vol. xxx., 39.

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March 4, 27,
1896.

(Before LYNCH and FITZGERALD, Q.C., Commissioners.)

Langtry v. Sheridan.

Land Laws—Redemption of Rent—Lease for lives renewable for ever made in June, 1860—Redemption of Rent (Ireland) Act, 1891, section 1.

Held, a lease for lives renewable for ever, executed after the Renewable Leasehold Conversion Act, and before the Landlord and Tenant Act, 1860, came into operation, is within the Redemption of Rent (Ireland) Act, 1891.—I.L.T.R., vol. xxx., 64.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
November 20,
1896.

(Before LORD ASHBOURNE, C., FITZGIBBON, BARRY,
and WALKER, L.JJ.)

Spaight v. Baker.

*Evidence under the Land Law (Ireland) Act, 1887—
Right of redemption under section 16 of the Land
Law (Ireland) Act, 1896—Retrospective effect of.*

This was an appeal by a tenant against a decision of the Exchequer Division, and was a case under section 16 of the Land Act of 1896. That section provides that in every case where an ejectment shall be or has been brought, and where the tenant would have been obliged, under sections 60 to 71 of the Land Act of 1860, to pay, tender, deposit, or lodge the amount of rent, arrears, and costs marked upon a Judgment against him, in order to be restored to possession of his holding, he shall now be placed in the same position as he would have been in by acting under those sections upon paying two years' rent in respect of all rent, arrears, and costs due up to the commencement of the ejectment proceedings. The tenant, Daniel Herlahy, who had succeeded to the rights of the defendant Baker in a farm near Skibbereen, County Cork, was served with an eviction notice under the Land Act of 1887, on the 19th April, 1896. On the 18th August following—the Land Act of 1896 having passed in the meantime—the tenant, through his solicitor, claimed the right to pay two years' rent under section 16, in lieu of three and a-half years' rent and some arrears, and to be restored to his holding. This offer being rejected, he applied for a

writ of restitution in the Exchequer Division, and lodged two years' rent in Court. That Division, consisting of Mr. Justice Andrews and Mr. Justice Murphy, held that section 16 did not apply to a case in which judgment had been obtained, and refused the application.

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Their Lordships unanimously held that section 16 of the Act of 1896 applies to cases in which judgment has been obtained and execution sped before the passing of that Act, and that on payment of two years' rent the tenant would be in the same position as if he had paid the sums payable under the previous legislation. They further held that the tenant was put in no better position in any other respect, because he is still required, in accordance with the settled practice under the previous legislation, in addition to paying the two years' rent, to undertake to pay any rent accruing due since the commencement of the ejectment. Their Lordships accordingly set aside the decision of the Exchequer Division, and ordered a writ of restitution to issue upon a certificate being given that the money had been paid.

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(Before BAILEY, A.L.C.)

Bell v. Glenny.

*Redemption of Rent Act, 1891—Fee-farm grant—
Fine paid.*

The facts of the case appear in the Judgment.

Kieran v. Mollan, and Lanyon v. Clinton, considered.

BAILEY, A.L.C.—A very important question arises in this case, and one which very largely affects the amount

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of the judicial rent which will be fixed on the holding. The tenant holds under a fee-farm grant of 23rd September, 1874. He or his predecessor in title had become tenant under a lease for three lives, with a covenant for perpetual renewal, dated the 9th day of March, 1874. On the 11th August, 1874, the lessor, who himself held under a renewable lease, had that lease converted into a fee-farm grant, at a perpetual fee-farm rent of £9 5s. 3d. Thereupon Bell, the under-tenant or lessee, also holding under a renewable lease, applied for a grant in accordance with the provisions of the Renewable Leasehold Conversion Act, and the grant now before us was executed. The lease under which Bell became tenant recited that the consideration therefor was a fine of £1,300, and the perpetual yearly rent of £100. It would appear from the evidence that the holding had previously been let to another tenant at a very much higher rent than £100, and the fine would appear to have been paid to get the holding at a reduced rent. The question accordingly arises whether and to what extent we should take the fine into account in fixing the fair rent of the holding. Under similar circumstances I held some years ago—in the case of *Gault*, tenant; *Wilson*, landlord (26 I.L.T. & S.J., p. 432)—that the payment of the fine should be regarded as a part purchase of the annual rent of the holding, and that the tenant on having a judicial rent fixed is entitled to have his fair rent reduced in a ratio proportionate to the extent of his interest.

Under somewhat different circumstances I held similarly in the case of *Mollan v. Kieran*, 1894 (2 I.R., 27). In that case Mr. Justice Bewley decided that my view was erroneous, and did the matter rest there the question would be unarguable, and we could give no consideration to the fine by way of reduction of rent. Subsequently however, to Mr. Justice Bewley's decision in *Mollan v. Kieran*, which was not appealed from, the case of *Lanyon*

v. *Clinton*, 1895 (2 I.R., 150), came before the Court of Appeal. There the grantee had paid a fine to the landlord to obtain a fee-farm grant, which was subsequently set aside. The Court of Appeal held that in fixing the fair rent of the holding it was competent for the Land Commission to have regard to the fine paid by the tenant for the grant. The question now arises, Does the decision in *Lanyon v. Clinton* go the length of enabling the tenant to have the fine in this case taken into account in fixing the rent? In *Mollan v. Kieran* Mr. Justice Bewley decided that a fine could not be taken into account, on the ground that if the fine were paid for a lease it would be absurd to reduce the rent after the expiration of the lease, when the tenant had got all that he had paid for. This is indisputable, and I had always held that no allowance could be given for a fine after the expiration of the lease for which it was given, and that where the lessee came into Court during the currency of the lease under the Act of 1887, he was entitled only to consideration for the proportion of fine which was still unsatisfied—that is, if a fine of £300 were paid for a thirty years' lease, and if the tenant came into Court after twenty years, he was only entitled to consideration for £100, being one-third of the original fine. I also was of opinion that the words in the 1st section of the Act of 1887 providing that a lessee taking advantage of that section is to "be deemed to be a tenant of a present tenancy in like manner and subject to like conditions . . . as if his lease had expired," referred only to the conditions of his lease "so far as such conditions are applicable to tenancies from year to year," as provided in the 21st section of the Act of 1881. Mr. Justice Bewley, however, apparently gives the word "conditions" a wider meaning than I had done, and would include in the word "considerations" and "circumstances" such as the payment of a fine.

The Judgments of the Court of Appeal in *Lanyon v.*

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Clinton are very wide in their application. There is no attempt to limit the consideration of a fine to any particular set of circumstances. Lord Chancellor Walker, after reading sub-section 1 of section 8 of the Act of 1881, "the Court, having regard to the interests of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district, may determine what is such fair rent," said: "These are words of the widest character, and I think have been advisedly left in this wide form. 'All the circumstances of the case' do not, of course, mean that the Land Commission are to take into account matters merely personal to the tenant. But it would in no way strain the meaning of the words if we read them as giving power to the Land Commission to take into account a fine paid by the tenant for the tenancy with which they are dealing. I think the words mean 'all the circumstances connected with the tenancy.'" During the argument of the case before the Court of Appeal it was apparently admitted by counsel for the landlord that a fine may be regarded when paid for the actual tenancy in respect of which the fair rent is being fixed. The Lord Chancellor, dealing with this admission, said: "Under what branch of the section does this power arise? The 10th sub-section is not of an affirmative character, and I think it involves that when money is paid to the landlord, it may be taken into account under the earlier part of the section. I think the Court has power to take a fine into account under the language of sub-section 1, or, at all events, under that sub-section coupled with sub-section 10, and in my opinion the true construction of both sub-sections is this: where money has been paid to the landlord for the tenancy of any holding, that money may be taken into account by the Court fixing the fair rent, but to what extent is left in the widest terms to the discretion of the tribunal." Sir Peter O'Brien, C.J., concurred with the Lord Chancellor, and held that, under

the words "all the circumstances of the case," fines might be taken into account; and FitzGibbon, L.J., in agreeing, said: "I do not think that the fee-farm grants are to be entirely thrown out of consideration. They were the root of the present tenancies, and the fines which were paid for them seem to me to be among the circumstances of the case to which the Land Commission is directed to have regard." This statement is of great importance in the present case, where the fine was paid for a lease which was the root of the grant under which the tenant now holds.

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I have entered at some length into the discussion of this matter, as the law has been apparently somewhat doubtful. Having regard to Mr. Justice Bewley's views, so clearly expressed in his Judgment in *Mollan v. Kieran*, I have grave doubt as to how the matter will be finally decided. I feel, however, coerced by the Judgments of the Court of Appeal to come to the conclusion that, under the circumstances we have before us in this case, we must hold that the tenant is entitled to have the fine paid by him on becoming tenant taken into account or have a judicial rent fixed. This I now decide on authority. I formerly came to the same conclusion on my own view of the statutes. That view, and the grounds on which I based it, I set forth in my Judgments in *Gault v. Wilson* (26 I.L.T. & S.J., p. 432) and *Mollan v. Kieran* (1894, 2 I.R., p. 27), and I need not again go into them. The next question that arises is as to the amount of the allowance which should be made from the rent on account of the fine. In the cases I have referred to I held that the payment of the fine was to be regarded as a part purchase of the interest in the holding. Consequently what we have to do is to ascertain what proportion of the interest in the holding is represented by the fine, and deduct a like proportionate amount from what would otherwise be the fair rent, to arrive at the judicial rent. In any consideration of this

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question of fines not much light is to be had on the manner in which they are to be taken into consideration. In *Lanyon v. Clinton* we are not informed how the fine was allowed for.

I have very carefully considered the matter, and have come to the conclusion that a simple allowance by way of interest on the amount of the fine will not do. That may be a simple and easily understood method, but it will be seen on a little consideration that it will not work out properly. It might very easily result in no rent at all being left in a case where the fine was large and the rent small. The method that I have adopted of regarding the fine as representing a certain share in the interest in the holding, can never lead to such a result. In the case before us the rent of the holding when the lease was made and the fine of £1,300 was paid, was £100 a-year. The first matter to be determined is: What was the capitalized value of the holding from the point of view of rent or annual income at the time? We may fairly assume that the landlord expected to get at least a return of 3 per cent. on the interest he had in the holding. Now, the capital sum which at 3 per cent. would yield £100 a-year is £3,333. That accordingly will represent the capital value of the landlord's interest in the holding. Adding to that the amount of the fine paid by the tenant to acquire a part interest—namely, £1,300—we get a total of £4,633, which represents the combined capital value of the interest in the annual rent of the holding. Now, the fair rent of the holding as it stands we estimate at £96. Dividing that sum in the proportion of £3,333 to £1,300, we get the sums of £69 1s. 3d. and £25 18s. 9d., the latter sum representing the tenant's share of the fair rent, and the former the landlord's. Taking all the circumstances into account, we think that the fair rent of the holding should be £70.

[Not reported.]

COURT FOR LAND CASES RESERVED.

(Before the LORD CHANCELLOR, the MASTER OF THE
 ROLLS, the VICE-CHANCELLOR, DEASY, B., FITZ-
 GERALD, J., MORRIS, J., LAWSON, J., BARRY, J., and
 DOWSE, B.)

December 18,
 1872.

Carr v. Nunn.

Landlord and Tenant Act (Ireland), 1870. The character of a holding with reference to the 71st section of the Act cannot be determined by any general rule, but depends upon the special circumstances of each case, and, in ascertaining it, the object with which the tenancy commenced, the quantity of land comprised in the holding, and the use to which it has been applied, are material.

A villa residence with 8 acres of land attached, only half an acre of which, at the time of claiming, was in tillage, and 6 acres, forming a lawn, in pasture.

This was a claim by the tenant, a solicitor, to register improvements under section 6. It appeared that by lease, dated the 21st August, 1845, Edward W. Nunn, the respondent, demised to the claimant "all that and those, the house, offices, land, and premises, together with the quay, landing-place, or manure-bank at Camlin, containing, in the whole, 8 acres, Irish plantation measure, to hold from the 29th day of September then last past, for the lives of three *cestui que vie* therein named, and after and from the death of the survivor for the term of thirty-one years, at the yearly rent of £35." The premises are about a mile and a-half distant from New Ross. At the time of the execution of the lease, part was in pasturage and part under potatoes; and the embankment, subsequently reclaimed, was covered at high tide. The house then contained

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four apartments, each 12 by 14. It was then a slated hunting-lodge. There was stabling for five horses, part of a kennel for hounds, and two other houses, one of which might be used as a cow-house, and the other as a coach-house. Additional rooms were since built. The fences, which at the date of the lease existed on the lands, had been since levelled, and the land at present, except that occupied by the house and the manure-bank, consists of a garden, containing half-an-acre, a lawn, including the reclaimed land, containing about 6 acres, in pasture, and a field, containing about half-an-acre, in tillage. Part of the new offices since built are used for the accommodation of other farms of the claimant. It was proved for the respondent that £20 would be a proper rent if let for agricultural purposes. The questions reserved for the consideration of the Court were: First, whether the claimant's holding was agricultural or pastoral, or partly agricultural and partly pastoral, in its character, within the meaning of section 71 of the said statute. Second, had the judge authority to inquire whether the improvements were suitable to the holding, or was the claimant entitled as of right to an order for leave to file in the Landed Estates Court a schedule specifying all the improvements admitted to have been made by him on his holding?

Held, not to be within the Act, and that under a claim to register improvements the Court must inquire whether they are suitable to the holding.—I.L.T.R., xxvi.; I.R.I., Reg. and Land Act, Ap. 89.

COUNTY COURT.

County Court.
January,
1874.

(Before HEMPHILL, Q.C., C.C.J.)

M'Cutcheon v. Lansdowne.*Landlord and Tenant (Ireland) Act, 1870, section 71.*

A holding, consisting of a dwelling-house and 17 acres of land attached, adjoining the town of Kenmare, was taken by the Rector at the yearly rent of £16 16s., £10 thereof being abated in consideration of his keeping in order the walks and hedges, which were very ornate and extensive. The lands were worth £35, and the house £36, a-year. The holding had been previously used as the Rectory, and was laid out in grass, except 5 acres which were tilled, and before that had been used as a nursery for training trees. The claimant tilled 4 more acres, placed sheep and cattle on the land, and sold butter and milk produce, but did not realize a profit. The house was much superior to that suitable for a 17-acre farm.

Held, that the holding was not agricultural or pastoral within section 71 of the Landlord and Tenant (Ireland) Act, 1870.—I.L.T.R., ix., 20.

Case stated.
June 7,
1874.

COURT OF EXCHEQUER.

(Before PALLES, C.B., FITZGERALD, DEASY, and
DOWSE, BB.)

Doyne v. Campbell.

(Case stated.)

*Landlord and Tenant (Ireland) Act, 1870, section 71—
Holding agricultural or pastoral in its character.*

This was a case stated by Deasy, B., which arose on a civil bill appeal on a process for rent in respect of 25 acres, Irish, of land, situate five miles from Dublin, taken by a Dublin merchant at £300 a-year, as a residence, but also with the intention of making profit out of the land, which would assist him in paying the rent. About 15 acres were in pasture, and the remainder under buildings, ornamental grounds, and plantations. The rent, at a valuation, would be properly apportioned at £200 for the dwelling-house, garden, and ornamental grounds, and £100 for the rest of the premises. The tenant kept about 20 head of cattle on the land, and in one year had 20 tons of hay off it. The letting was made in 1871. The tenant claimed to deduct one-half the county cess under section 65 of the Land Act. The only question reserved on the case stated was whether the holding was agricultural or pastoral, or partly agricultural and partly pastoral, within the meaning of the 71st section of the Land Act.

PALLES, C.B.—To ascertain the character of the holding we must look at the entire holding. Looking at the entire holding, and having regard to the dealings of both parties respecting it for the purpose of ascertaining its character, we find both parties dealing with it as a

residence and not as an agricultural or pastoral tenancy, and it is impossible to think that it would have been taken as a farm. It would not serve the purpose of making money by its use as a farm. Indeed, the evidence of the defendant himself is conclusive on the question. Its primary use to him was as a residence, with the subordinate use of making money out of the land attached, out of which he believed he could make a large portion of the rent. But he took it as a residence as its primary use. Looking at the entire character of the holding, and not merely of the land, we consider that it was held as a residence, and that upon the evidence it has not been shown to have been agricultural or pastoral.

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DEASY, B.—Not that I entertained any doubt on the question; but as its determination involved a future yearly liability to county cess, and would affect a considerable extent of property in the vicinity of large towns, I thought it right to state the case for the opinion of the Court. With that opinion now expressed I concur.

DOWSE, B.—I shall only add that, in my opinion, this holding cannot properly be described as a farm with a house on it.

Fitzgerald, B., concurred.—Donnell, 456.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
February 9,
1893.

(Before WALKER, C., FITZGIBBON and BARRY, L.JJ.)

Stott v. Cramsie.

Residential holding—Clause in a lease partly excluding Ulster custom under Landlord and Tenant (Ireland) Act, 1870—Relative valuation on buildings—Physical aspects of the holding—The terms of the contract.

The tenant held under a lease, of date 1876, a dwelling-house and 24 acres of land, which consisted of a lawn, garden, and orchard, for a term of thirty-one years. At the same time the tenant took from the landlord, for a term of ten years, an adjoining holding of 22 acres on which a fair rent had been already fixed. There were no agricultural buildings on the premises. The lease contained a covenant by the tenant that he would not claim compensation under the Act of 1870 in respect of buildings erected without consent, in writing, of the landlord, but without prejudice to any claim he might have for unexhausted tillage or manures.

The Sub-Commission (Greer, A.L.C.) dismissed the originating notice to fix a fair rent, on the ground that the holding was residential in its character. The Land Commission reversed the decision, on account of the clause in the lease as to compensation.

The landlord appealed.

Held (reversing the Land Commission), that the letting was residential, notwithstanding the clause in the lease as to compensation under the Act of 1870; that such a clause was not sufficient to take the particular case out of the exception of the Land Law (Ireland)

Act, 1881, having regard to the physical aspects of the holding.

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WALKER, C.—The tenant, a solicitor, wanted in the year 1876 a place near Ballymoney in which to reside, and where he could have out-door exercise for the good of his health. With this view, he took a house and 44 acres of land, divided into two holdings. The house, lawn, garden, and orchard were to be let in one take by lease for thirty-one years ; this take comprised 24 acres. To this lease there was attached a map that showed the physical aspects of the holding. There were no agricultural offices whatever. Of the valuation of the premises, seven-elevenths were on buildings. As to the user, it has been proved that the land was not fit for agricultural purposes, and that any tillage that was on the land was carried out with the object of laying down in grass. The house contains a dining-room, drawing-room, and several bed-rooms, while the surroundings show that it was a villa residence. Mr. Justice Bewley and the other members of the Land Commission appear to have been unanimous that the holding was residential but for a clause in the lease (set out above) which they treated as conclusive against the landlord. But I think it is a fallacy to take a clause of that kind as excluding the holding from the exceptions in the Land Act of 1881. Having regard to the evidence as to the physical aspects of the holding, such a clause as that could not be taken as conclusive in favour of the tenant. In my opinion the Assistant Commissioners were right, and the appeal must be allowed with costs.

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FITZGIBBON, L.J.—The lease of the house, garden, and orchard conveys also the "right of way of the farm avenue." What is this farm avenue? It is the right of way approaching other land, and, therefore, it is described as a "farm avenue;" not in reference to this holding at all, but to this other land. The next

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thing we may look at is the valuation ; and seven-elevenths are issuing out of buildings, and only four-elevenths out of the land. There is evidence in the case which leaves no doubt, especially with reference to the plantation and the mode in which the land is laid out, that the land is practically useless for any other purpose than that of ornamental land in connection with the dwelling-house. Then, within the last ten years only 9 acres were broken up, and of these 9 acres, 3 were broken up for only one year, and within the three years a corn crop was taken off the 3 acres, and they were again laid down in grass. There is no evidence whatever that a single crop of any sort, kind, or description, has been raised on the place or sold for the purpose of making money by way of farming. Then the next and last element to be considered is the parties. The tenant is a solicitor, who wanted a place in the country where he could have out-door occupation for the benefit of his health. He did not take the place for the purpose of carrying on farming business, but for the purpose of health. It is not the kind of farm that is described in the Act of Parliament as "an ordinary agricultural farm." I am distinctly of opinion that all the matters I have referred to are legitimate matters for consideration in determining the question of residential holding, subject always to the qualifications which I regard as a complete qualification, that the terms of the contract do not conclude the question one way or the other. If there is a contract that concludes the matter, we cannot go beyond it. But in looking at the contract we consider the subject-matter, the parties, the circumstances of the contract, its purpose, and other things leading to it. In this case the contract has very little to do with the determination of the case, so far as facts are concerned. The Sub-Commission, with much common-sense, seem to have determined that the thing could not be listened to at all, and they treated the

application with scant consideration, and dismissed the originating notice. The case then came before the Land Commission, and the Land Commission would have come to the same conclusion, but for a clause in the lease ; so that it was a case that the Land Commission determined upon one, and only one, of the elements for consideration that I have mentioned.

BARRY, L.J.—I concur. The question here is, whether the holding is, in the language of the Lord Chancellor, a residential holding. It seems to me to be a question of fact. The first thing to consider is the subject-matter of the letting, because until you have got a holding agricultural, or partly agricultural, or pastoral, or partly pastoral, you have nothing to operate upon at all. It appears to me that Mr. Todd's contention (for the landlord) and the decisions in the Court below involve this proposition : that if in the contract of tenancy there are to be found clauses which are inconsistent with the holding being agricultural or pastoral, that that is absolutely conclusive not as to what the parties contracted for, but as to the character of the holding, that is, the physical character of the holding, and that by the introduction of this clause in the present lease, quite irrespective of the real condition of things, and no matter what were the circumstances, the holding is to be considered within the operation of the Land Law (Ireland) Act, 1881. I confess that I never heard that proposition put forward in this Court before. All I can say is that I never heard it urged at the Bar, and I have not heard it decided by any Judge in this Court that these clauses were anything more than evidence, more or less strong, and cogent of the other facts of the case. Here I find a letting made in very peculiar circumstances. There is what we now call a residential holding. There is undoubtedly an agricultural holding attached to it ; but the tenant wanted a separation of the residential part from the agricul-

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tural or pastoral part ; the landlord would not consent. There are no agricultural buildings of any sort whatever ; but there are a garden, a greenhouse, and land absolutely unsuited for agricultural purposes. Then, of the valuation, seven-elevenths of it are for buildings. The Land Commissioners themselves say that they should have no hesitation in deciding that this was a residential holding, but for this clause that has been referred to, and which Mr. Todd has, with great ability, endeavoured to bring in as conclusive against the landlord. The case is a very clear one, and I think it is only another proof of the vigour, energy, and perseverance of the Irish Bar, and that no matter how hopeless a case may be, it will be argued with courage.

Originating notice dismissed.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
September,
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(Before WALKER, C., SIR PETER O'BRIEN, C.J.,
FITZGIBBON and BARRY, L.JJ.)

Moonan v. The Marquis Conyngham.

Residential holding—Estoppel—Character of the holding
—Carr v. Nunn—Boggs v. Wallace—Doyne v. Campbell—Spring v. Blennerhassett, and Waldron v. De Vesce, considered.

The holding was demised by the Marquis Conyngham to John Cornwall by lease of 5th October, 1849, for a term of thirty-one years or three lives from 1st October, 1845, subject to a rent of £107 7s. The lands were described as "that part of the lands of Slane, called Castle Parks,

with the dwelling-house, offices, and buildings of all kinds thereon, containing 86 acres, 3 roods, 30 perches, statute measure, or thereabouts," and the lessee was described as "John Cornwall, jun., of Castle Parks, in the County of Meath, Esq." The lessee assigned the lease in 1885 to his nephew, Captain Crosby, the son of Robert Cornwall, who had changed his name. He died intestate in 1889. His father was his heir, who took out administration to him, and thereupon set up the holding for sale by auction on 1st November, 1890. It being represented at the auction that a fair rent could be fixed at the expiration of the lease, Moonan purchased for £1,600. In 1891 the lease expired. Moonan forthwith served an originating notice to fix the fair rent, it having been proved that the land was used for the purposes of production, and that by the working of the land the rent was earned.

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Held, that in the absence of evidence to show that the holding was by character residential, the fact of the tenant having altered the residence so as to make it too good for an ordinary agricultural farm was not of itself enough to impart, in the circumstances of the case, the character of a residential holding, and that a fair rent might be fixed.

The Sub-Commission (Bailey, A.L.C.) dismissed the tenant's originating notice. The Land Commission affirmed the decision. The Court of Appeal reversed with costs.

WALKER, C.—Though the whole of the expenditure was the tenant's, the lease demises the house and buildings to the heir, and in law they must be treated as the landlord's property, and it must be held that the tenant took from him the holding as it was in 1849. The house is a two-storied one; it contains a drawing-room, a dining-room, and a breakfast-room, six bedrooms upstairs, kitchen and pantries, two dressing-rooms. There is a garden surrounded by walls, which also form the road boundary. There is a plantation of 2½ acres.

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There is a lawn in front, of 3 acres, separated from the rest of the land by a wire and sunk fence, and the house, garden, shrubbery, plantations, and lawn comprised about 7 acres of the entire holding. As regards out-offices, which were built by Mr. Cornwall, there is a coach-house, a stable with four stalls and a loose box, a cattle range of 75 feet by 12, which includes tying for six cows. I see nothing unsuitable in the offices. Mr. Cornwall only occasionally lodged there. The lands were used for grazing, and managed by his steward. The farm is just beside the residence of Lord Conyngham, and it is surrounded on two sides by a wall. Having regard to the general character of the residence, the question is, first, whether the residence and its surroundings are such an overshadowing feature that they dominate the holding, and deprive it of an agricultural character.

In considering this question I leave out of sight the fact that Mr. Cornwall was a gentleman, as I do also that Mr. Moonan is a cattle-dealer. No doubt, if Mr. Cornwall was not a gentleman, he would not have incurred so large an expenditure on the house and offices as £1,600, and I am willing to concede that the house is too good for a farm of the size; but what the landlord set and measured the rent on was the land. It is larger in area than any holding which has yet been held to be residential, and it is in the heart of Meath, not a villa residence. There is no covenant in the lease which stamps a residential character upon the holding, and, on the whole, considering the rent, the valuation, and the area, I do not think the case is brought within *Carr v. Nunn*, 7 I.L.T.R., 26 I.R.R.L., Appendix 8; and *Doyne v. Campbell*, 8 I.L.T.R., 101; I.R., 9, C.L., 95; and I look on it as a farm with too good a house on it for its size, rather than a residence with some land attached for the purposes of a residence. What occurred at the auction is evidence against the land-

lord, as acts and admissions of his in respect of the character of the holding. It appears that by reason of the death of the owner the place was extensively advertised for sale; and in the poster announcing the sale the premises were described as the charming residence, with nearly 100 acres of the best land in Meath. The poster also stated that the purchaser would be entitled on the expiration of the lease to fix a fair rent. This advertisement was widely circulated, and was read by John Moonan and others. Several bidders attended, and, amongst others, the solicitor for the landlord was at the sale. It will be observed that the age of the surviving life is not mentioned. Robert Cornwall, the last surviving life, was aged 62; but the age was immaterial if a fair rent could be fixed. The landlord's solicitor went there with authority to bid up to £1,200. I think it is wholly immaterial whether he did so or not. He evidently had some authority also from Lord Conyngham as to the question of the holding coming under the Land Acts. Every man who went to bid had in view the thing as described. The landlord's solicitor said in his evidence :—"I saw Mr. Daly (auctioneer), and I informed him that I had seen the allegation in the poster which had been proved here, that at the expiration of this lease for lives the tenant can have a fair rent fixed. I stated that such was not the view of the Marquis of Conyngham, and that, if he stated it in the auction room publicly, I should have to object and dissent from it; but that I did not wish in any way to do so, as there was a valuable interest in the holding; there was one life, and I do not wish to spoil the sale, and he said, under those circumstances, certainly he would not read it or have it read." The landlord's solicitor, Mr. Barlee, knew that every man there was bidding under the impression that he would get a subject-matter within the Land Act, and what he did amounted to this :—that he told the auctioneer to keep

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silent on this the most material point in the whole sale. "Don't spoil the sale; don't correct the prevailing impression conveyed by the poster." The sale accordingly was not "spoiled," and Moonan gave £1,600 for the holding, a purchase-money which never would have been given if Mr. Barlee had spoiled the sale, and told what he now, on behalf of the landlord, asserts. He said to the auctioneer, "Put it up as you represent it. I will stand by and hold my tongue." Thus he allowed a most material representation to be made in his presence, and every bidder acted on it. If he himself had knocked it down to Moonan, how would it be? His silence both encouraged and confirmed Moonan's bid. Mr. Barlee acted in perfect good faith; it is almost unnecessary to say that, having regard to his high character. But if the conduct was material, it is an irresistible inference of fact that Moonan was induced to act by that conduct. It is not necessary to prove that the party was actually induced. If it were necessary, I should be prepared to decide that Lord Conyngham could not now assert against Moonan that the holding is not what the poster describes it. The holding is not shown to be not agricultural or pastoral, and, in my opinion, the order of the Court below should be reversed.

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FITZGIBBON, L.J., concurring, said :—The issue here is one of fact. "Residential holdings" are holdings possessing a specific character, but one which is neither agricultural nor pastoral, and the facts of each case must show the character of the holding to be "residential." Bearing in mind, therefore, that we have to deal with one homogeneous holding, I think the test of its being "residential," or "agricultural," or "pastoral," is whether, as a whole, it derives its character from the land or from the house. If the land, as a thing to be worked for profit or subsistence—land as a productive agent—is the predominating characteristic—the leading

constituent—it follows that the character of the holding is agricultural or pastoral; if, on the other hand, the land derives its chief importance from the fact that it is the site of a house—if the holding is a place of residence rather than a farm—if the residence is the predominating element—then the character of the entire holding is “residential.” What are the tests? What is the standard by which we are to ascertain which of the two characteristics predominates in any particular case? Every circumstance is to be considered, and the result will often be determined upon a balance of evidence. But before going further, two questions are to be excluded from this case, because they have not been presented to us. First, we have the express declaration in so many words, by counsel for the landlord, that this holding is not “demesne land.” Secondly, neither here nor before the Land Commission was the question raised whether this holding was “let to be used wholly or mainly for the purpose of pasture.” It is in a pastoral district; it is all in grass at present, and it has not been broken up for many years; but throughout the entire case the question of its being a pasture letting was never mentioned, and the case has been entirely dealt with as one to which the express exception of lettings for pasture does not apply. Our decision, therefore, has no bearing whatever on “demesne” or “pasture.” We are, therefore, face to face with the question, What is the character of this holding? Treating it as a holding with a specific character, is that character “residential,” or is it “agricultural” or “pastoral”? It cannot be treated as partly the one, and partly the other, for the arguments have shown that it has one predominating character, and the only question is—What is that character?

In approaching that question it is difficult to find better guidance to a correct decision than in the Judgment of Lord O'Hagan, C., in *Carr v. Nunn*:—“We

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have to regard the nature and extent of the property, the object with which the tenancy commenced, and the use which the claimant has made of the tenement, in order to determine the nature and character of the holding." First, what is the subject-matter of the letting? The figures are of vital importance. The rent reserved is £107 odd, about 20 per cent. less than the total valuation, and less than 10 per cent. above the valuation of the land alone. Before the contract for the lease a dwelling-house was inhabited by a tenant, about whom or his house there was nothing to indicate that the place was anything more than an ordinary agricultural holding. Between the date of the contract for the lease and the actual execution of the lease—a period of four years—extensive alterations, additions, and improvements were made by the intending lessee. Comparing the old Ordnance Survey of 1836—which is none the less instructive because it is not quite certain that it is legal evidence—there appears originally to have been a square house on the place, to which a large addition was made, and ultimately the house and offices were so far enlarged and improved that the valuation on the buildings was fixed at £30, as against the value set upon the land. Before the lease was made, as I understand the map, the place was laid out in three fields, with a garden round the house, and plantations lying together near the house. But the "non-agricultural" parts of the holding did not occupy in all more than about 8 acres out of the 87 which the holding contains; and 79 acres of good, productive grass land formed the rest of the holding, laid out, as land in that district usually is, in large fields or runs for feeding cattle and sheep. The main use and value of the property, therefore, was for feeding farm stock.

The matter next in importance is the lease. It does not contain any specific provisions leaning one way or the other; but the land is primarily demised, and the

dwelling-house and buildings thereon go with it. There is also a provision, which I think is of importance, that the lessee shall not sub-let or subdivide. In one residential case—*Boggs v. Wallace* (27 I.L.T.R., 105)—there were two dwelling-houses on the holding: the tenant lived in one, and made considerable sums by letting the other separately from the land, as a summer or seaside residence. Again, in *Waldron v. De Vesce* (not reported), there was evidence that the house alone could be let for £60, and proposals to take it for separate occupation as a residence were proved. But in this case the lease makes it perfectly clear that whoever occupied the land was to occupy the house, and *vice versa*, and that the house was never to become a separate holding. The lease contains some of the ordinary agricultural clauses—*e.g.*, the covenant to keep the place in tenantable order; and there is an entire absence of the clauses specially suited to a residential holding—*e.g.*, a covenant to insure. Therefore, the contract of tenancy contains nothing to indicate a residential as distinguished from an agricultural or pastoral character. It is a most persuasive fact that, having regard to the circumstances of the letting and the improvement of the house, the rent of £107 odd must have been regarded as issuing entirely out of the land, and it is calculated almost to the penny at the rate of £2 per Irish acre. In fact, we are almost driven to conclude that the house was left out of consideration altogether in fixing the rent. I do not ignore the fact which impressed the Land Commission, that the house was made by the tenant a very different thing from what it had been at the date of the contract for the lease. But I must point out that this is a very dangerous principle to act upon, and we must be very cautious in applying it in excluding holdings from the Land Acts. For it amounts to this, that though a landlord lets an agricultural holding as such, the tenant may deprive it

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of that character, and exclude it from the Land Acts, by expending his money too freely in improving his own residence upon it. I think the more just and rational inference is this: that if the tenant, without otherwise altering the holding, merely makes the house in which he lives too good for the holding, he does not thereby change the character of the entire holding, even though he makes the house better than an ordinary agricultural tenant of the land would be likely to want. Under the Land Act of 1870 improvements not suitable to the holding are not the subject of compensation; but making unsuitable improvements is a very different thing from depriving the holding of the character which it previously had, and I fail to see how the putting on a holding, let as a farm, buildings which, though not altogether requisite or entirely suitable, do not interfere with the user of the holding as a farm, can be held necessarily to alter the character of the holding. I conclude, therefore, that in this case the object of the landlord was to let his land, and the first object of the tenant was to work that land for profit, though he also wished to have a good house for himself upon it.

This brings me to the last of Lord O'Hagan's tests—"the use which the claimant has made of the tenement." After Mr. Cornwall took this place he continued to reside in Dublin; he only occasionally slept in the house on the holding. He did not make it his permanent residence, and he managed the place by a steward. A steward is not the sort of inhabitant whom I should expect to find upon a holding, of which the character was too markedly residential as to overshadow and obliterate the agricultural or pastoral character which it previously had. Tried by all the tests suggested by Lord O'Hagan, the character of the holding is agricultural or pastoral; or at least I may put it this way: the tenant has discharged the *onus* which, in the first instance, lay on him, of showing that the

holding is, *prima facie*, of an agricultural or pastoral character, and the landlord has failed to discharge the *onus*, which was then thrown upon him, of showing that the character of the entire holding was residential. I hold that what occurred about the auction overwhelmingly confirms the conclusion at which I have arrived, on the grounds I have stated, and I use and rely upon it as confirmatory evidence of the strongest character.

But I have two objections to basing my Judgment entirely upon what was said and done at the auction. The first is, that if I rested my Judgment solely on Mr. Barlee's action, it must follow that Lord Conyngham lost an advantage—I might even say lost a valuable piece of property—through the conduct of his solicitor, whose duty it was to guard his interests. But secondly, I do not like to base my Judgment on this ground alone, because it appears to me that if we make what occurred at the auction the deciding matter in the case, we can only do so upon the ground that Mr. Barlee knowingly and intentionally "kept in his sleeve" Lord Conyngham's intention to rely upon the residential character of the holding, while he permitted the bidders to raise the price upon the faith of the statement that the holding was within the Land Acts. I can give no other meaning to abstention from "spoiling the sale;" and I decline to impute to Mr. Barlee the intention of preventing the sale from being "spoiled" by knowingly allowing the purchaser to bid and pay for an interest which he was not to get. But while I decline to decide this case *entirely* on what Mr. Barlee said and did, I attach the greatest importance to what *happened* at the sale, for it appears to me to be most persuasive evidence upon the real issue—What was the character of the holding? When I find a holding advertised and put up for sale by public auction, with the express declaration that at the expiration of the lease the tenant will be entitled to fix a fair rent, and when it is brought home

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to the knowledge of the landlord that the holding is being so dealt with, and he sends his solicitor to watch his interests on the occasion, and authorizes him to buy the thing so described if he can get it for £1,200, this is direct evidence against every man who saw or acted on that description—and especially against the landlord, who knew the place—that the holding possessed the character under which it was put up for sale. In that point of view I have no difficulty about Mr. Barlee's authority. He was sent to the auction to represent the landlord, to watch the proceedings, to bid up to £1,200 for the interest that was advertised for sale. He was so sent with knowledge of what the holding was asserted to possess, and it is idle to pretend that the purchaser bid £1,600, or that Lord Conyngham would have given £1,200, merely for the remaining term of a life whose age was not even stated. At the sale all parties, Lord Conyngham and Mr. Barlee included, dealt with the holding as one to which the Land Acts applied, and this is the best evidence to show that it was agricultural or pastoral in its character.

I wish to add a few words about the Judgments of the Land Commission and of Mr. Commissioner Fitzgerald. Mr. Bailey appears to me to have forgotten that the entire holding, house and lands, was admitted to be homogeneous. He quotes the Lord Chief Baron in *Doyle v. Campbell* for "the most appropriate use" of the holding, and he quotes the passage to which I have already referred from Lord O'Hagan's Judgment in *Carr v. Nunn*; and then he says that "the nature of the holding in this case points strongly to its being one of the class of holdings residential and non-agricultural." But there has been no case in this Court, and there has been only one that I know of before the Land Commission, in which a holding at all approaching this one in acreage has been held to be residential. Mr. Bailey says that "the most appropriate use" of this holding is "as a residence;" he,

with all respect, must be speaking of the most appropriate use *of the dwelling-house*, for he cannot say that the 86 acres of land were ever appropriately or at all used as a residence, and he ignores all the evidence derived from the extent of the place, the terms of the lease, the amounts of the rent and valuation, and the user by the tenant, as well as what happened at the sale. In fact, he forgets the land. Mr. Commissioner Fitzgerald's Judgment from beginning to end contains no reference to what happened at the auction, and none to the statement in the "Particulars" that the tenant would be entitled to fix a fair rent on the expiration of the lease. He says: "It is suggested that the lease was given to Mr. Cornwall in consideration of the buildings and other improvements and changes which he had effected on the holding, and which the landlord contended had the effect of changing the character of the holding, and making its natural primary use that of a residence and not that of a farm." I fail to see how the changes in the house could change the natural primary use of the land, or alter the character of the holding, as a whole, so long as the land remained the substantial portion of the holding—the portion on which the rent was fixed—and also remained the main and in itself the sufficient security for the annual rent of £107 7s. When the learned Commissioner refers to the advertisement and says: "Making every discount for the exaggeration naturally contained in such advertisements, it is impossible to shut out from our consideration that the statements in these advertisements show that, in the opinion of the vendors, the principal character of the holding, and its most appropriate use as a whole, was that of a residence," he plainly forgets the line at the bottom (which he does not read) stating that at the expiration of the lease the tenant will be entitled to fix a fair rent. Yet this is the line which raised the price to £1,600. The Judgment then proceeds: "Now, the

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present character and condition of the holding is the same that is acquired after the changes and improvements effected by John Cornwall after he got possession of it, before the letting under the lease was made to him. Taking all these facts into consideration, the inference we have drawn is that at the date of the lease the use of the entire holding as a residence was within the contemplation of both landlord and tenant, and that its most suitable use was as a residence, and that the use of the land for pasture or agriculture was subordinate to the use of the entire holding as a residence." I draw the opposite inference. The landlord fixed the rent and made the lease with a view to the land. The tenant's use as a residence has always been subordinate to that of the land as a farm. Beyond going down to the place occasionally from his residence in Dublin, and staying there occasionally, he has not used the house as a residence for anyone except his steward, and he appears to have used the land to make his rent out of it, by working it as a farm with the help of his steward.

It cannot be too often repeated that, in cases of this kind, previous decisions are only of value for the principles which they state; but these principles must be consistently applied, even though the facts of one case throw but little light on the facts of another. In *Doyne v. Campbell* there was a very large and handsome residence at Rathfarnham, close to Dublin, with 25 acres of land, of which 10 acres were under plantation, ornamental grounds and garden, and the remaining 15 acres were fenced pasture fields in the same enclosure as in the house, plantations, and ornamental grounds. I do not stop to go into all the particulars of the case; but the entire holding was, in fact, a villa residence, and I happen to know that it was very often let as such for the summer months at a very high rent. *Carr v. Nunn* and *Holmes v. Lauder* (22 L.R.I. 47) are similar cases, though on a smaller scale. There are, in fact, only two

cases where the facts bear the least resemblance to those of the present case. In *Spring v. Blennerhassett* (Macd. 236) there were in the holding 84 acres, and the rent was £165, which contrasts with the rent here, by being almost double the Government valuation. The Assistant Commissioners thought the holding came within the Act, and fixed a fair rent at £120. Upon the rehearing by the Land Commission, evidence was given which satisfied two of the Commissioners that the tenant had not taken the place as an agricultural holding, but that he took the land only as a subsidiary to the residence which was built on them. O'Hagan, J., dissented from his colleagues, and came to the conclusion that the holding was within the Act. In his Judgment he puts the matter as I think it should be put in this case:—"Unquestionably there have been decisions with which I thoroughly concur, that if a holding be really and substantially a residence with some land attached, still if the thing taken was the house, that being its real and substantial feature, the fact that there was some land as an accessory did not make that a pastoral or agricultural holding. Nevertheless, being bound to walk by my lights, I am unable to bring my mind and intellect to concur in the view that the holding is of the latter class. Here we have 84 acres of land, and a house in which a gentleman of the middle class might ordinarily live and manage the adjoining land as a farm. Unquestionably it was a gentleman's residence; but the Act of Parliament has not in any place made any distinction between the class of persons who should be in occupation of the holding, so as to be agricultural or pastoral in its character. With respect to his belonging to the class of gentleman or peasant, although Captain Spring be a gentleman of excellent family in this county, still if he be in possession of what appears to be substantially an agricultural or pastoral holding within the Act, though

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it might have a house on it in which a gentleman could live, I cannot find anything in the Act to exclude him." With that passage I entirely agree. The position of the man is unquestionably to be considered in determining whether he has taken the place as a residence, with land as an accessory, or has taken a farm with a residence upon it. But it is no more than evidence, and if a gentleman takes an agricultural holding, he is not to be put out of the Act because he makes the house on the holding more suitable for the residence of a gentleman than it would be for that of an ordinary tenant-farmer. Litton, J., though differing from O'Hagan, J., does not venture to lay down any such principle as that adopted in the present case by Mr. Commissioner Fitzgerald. He says: "The question is simply whether the land was taken for the sake of the house, or the house taken for the sake of the land."

There is not a shadow of evidence in this case that Mr. Cornwall would have taken this place without the land, or that the land was taken for the sake of the house. Having taken the land, he made the best he could of the house; but he used the land throughout just as he would have done if he had not enlarged the house. The ground upon which Mr. Commissioner Litton dissented from O'Hagan, J., therefore, does not exist in this case, and even if it did, I should prefer to take the law as I find it stated by O'Hagan, J. But the case is important as emphasizing the object of the letting, and as anticipating the principle stated by this Court in *Waldron v. De Vesci*. I quite agree with my brother Barry in wishing that we had some rough-and-ready means of doing justice in such cases, and of applying the Land Act, according as each particular tenant was or was not really justified in "posing" as an oppressed tenant, or was not really a farmer earning his bread out of his holding. But such considerations are not put upon us—at least they are not decisive.

We have to consider in each case whether the holding has got a particular character. Lord Ashbourne, in *Waldron v. De Vesce*, pointed out the elements for consideration, and I read some passages from Mr. De Versan's note of his Judgment, which was very applicable to this case:—"The size of the holding is 71 acres; the rent is £72. The acreage and the rent indicate that the rent is an ordinary agricultural rent. As to the house, unlike other cases of the kind, no particulars were given by the evidence. The lease entirely supports the view of the tenant. It contains only the ordinary agricultural covenants. The photographs do not help us. I think it is an ordinary agricultural holding such as a gentleman farmer might take. There is nothing to show that the house was not suitable for a holding of 71 acres." In all the alleged "residential" cases not one comes near the present acreage. *Carr v. Nunn* is entirely distinguishable; it was a small holding. In *Waldron v. De Vesce* I expressed myself somewhat in the same way as I have done here. In that case the house was not mentioned in the lease or shown on the map. I could see nothing in the house unsuitable for a man farming 43 Irish acres, and I concurred with the Lord Chancellor, having regard to the contract, to the extent of the holding, and to the paucity of the evidence on the part of the landlord. But, in any view of it, *Waldron v. De Vesce* was a far stronger case for the landlord, in my judgment, than the present case. I am satisfied that we cannot say that the parties have ever dealt with this holding as one of which the residence, as distinct from the land, was the predominating feature which gave its character to the whole. The land was used throughout for the purposes of production; it was stocked, grazed, and its working earned the rent. It did not lose its predominating character by the fact that the tenant made the house too good for an ordinary farmer, and occasionally lived in it as a gentleman.

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The house was not so much too good, was not so valuable or so large, as to change the character of the entire holding, and to obliterate the agricultural or pastoral character imparted by the land.

Sir Peter O'Brien, C.J., and Barry, L.J., concurred.—
I.L.T.R., xxviii., 117.

County Court.
January 8,
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COUNTY COURT OF ANTRIM.

(Before FITZGIBBON, C.C.J.)

Sharpe v. Gordon.

This was a suit brought by John H. Sharpe, Ballycastle, and Mary Gordon, Ballymoney, to recover £426 from Jane Kirkpatrick, Whitehall, Ballycastle, for improvements made on lands at Whitehall on the expiration of a lease.

The lands were originally leased by Charles Gray Kirkpatrick and Jane Kirkpatrick to William Sharpe, the lease to run for thirty-one years from the 1st November, 1865, and hence expired on the 1st November, 1896. The applicant gave up possession on the 31st October, 1896, and, having given up the premises, he served a notice of claim on the 20th November last for £426 for improvements on the lands by himself and predecessors. These improvements comprised buildings, fencing, &c. The reply to that claim was a counter-notice from the defendant, served on the 26th November, 1896, on which was claimed for dilapidation £229 13s. The lessee was described in the lease as "of Ballycastle, merchant," and on accompanying map the house upon the demised lands was indicated. The holding contained 21 acres and 5 perches; valuation was £24 on the land, and £22 on the buildings.

Evidence was given to show that the house was in every respect suitable for a gentleman's residence.

Boyle v. Foster and *Lepper v. Pooler*, *ante*, were referred to.

FITZGIBBON, C.C.J., said that William Sharpe, who had originally taken out the lease, had represented himself as a merchant, and, being so, he would hardly be taking the holding for the purpose of farming. The lease reserved a rent of £70 for 20 acres and a house, and previously it had been £100, it appeared, per year. Mr. Pinkerton had said land at Ballycastle was so high as £2 per acre. Now, 20 acres at that would be £40, which would leave £30 of a balance in respect of £70, and £60 in respect of £100 rent. He was now asked to hold that what had represented £60 was not a substantial part of the holding. The evidence given by Mr. Sharpe was also very much against him. He contended that it had been let as an ordinary farm, yet he had sub-let a portion at £5 per acre. That was not the rent of an ordinary farm. Under these circumstances it did not appear an ordinary farm, but a residential holding. Besides, the character of the house, how it was used, showed that to be so. If there was any difficulty about it, the case referred to by Mr. M'Grath was in point; it also had been of a letting of 21 acres, near Belfast, and this was near Ballycastle, and was held to be a residential holding. In his opinion, then, this was a residential holding, and he would dismiss plaintiff's case with costs, the set-off not considered. Thirty shillings witness's expenses would be allowed.

[Not reported.]

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SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
November 29,
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(Before WALKER, C., FITZGIBBON and BARRY, L.JJ.)

Connolly v. Tyrrell.

Where a lessee serves an originating notice to fix a fair rent under the Land Law (Ireland) Act, 1887, section 1, the landlord cannot resume possession under that section until the end of fifteen years after the lessee has so become a present tenant.

Case stated by the Land Commission.

By lease dated the 30th September, 1867, Mary Anne Tyrrell demised to Peter Connolly the lands of Ballinderry, containing 58 acres, Irish plantation measure, in the County of Kildare, for the term of twenty-one years from the 1st May, 1867, at the yearly rent of £87 10s., and the tenant went into possession.

On the 27th September, 1887, the tenant served an originating notice to fix a fair rent of the holding under section 1 of the Land Law Act, 1887. On the 14th November, 1887, the landlord served an originating notice dated the 8th November, 1887, of an application to the Land Commission for authority to resume possession of the said holding for the purposes of a home farm in connection with her residence. On the 1st May, 1888, the twenty-one years for which the lease was held expired, and on the 17th July, 1888, the tenant's originating notice to fix a fair rent came on for hearing before a Sub-Commission sitting at Edenderry, in the King's County; but as the landlord's originating notice to resume possession was not in the list for the same Sub-Commission, the hearing of the tenant's

originating notice was, on the application of the landlord, adjourned until the next sitting of that Sub-Commission, so that both the landlord's and the tenant's respective applications might be heard together.

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On the 23rd July, 1889, both the originating notices were heard, and the landlord's notice was, without going into the merits of his application, dismissed by order of 22nd August, 1889, on the grounds (1) that the tenant, by serving an originating notice, became the tenant of a present ordinary tenancy, and (2) that the landlord's notice of resumption was not served within the time required by the rules. A dispute arose as to the area of the holding, and the tenant's application to fix a fair rent was, by another order of the 22nd August, 1889, adjourned. On the 29th July, 1889, the landlord had applied to the Land Commission to deem the service of her originating notice of the 8th November, 1887, for resumption, good, notwithstanding that the 132nd rule of the Land Commission had not been complied with, or to extend the time for serving a fresh originating notice for resumption; and this application was, by an order dated the 14th of August, 1889, refused. An application for liberty to appeal from this order on the part of the landlord was subsequently refused; and on the 10th September, 1889, the landlord served notice of re-hearing from the order of the Sub-Commission of the 22nd August, 1889, when the Land Commission, by order of the 14th November, 1889, affirmed the order of the Sub-Commission, dismissing the landlord's originating notice for resumption; but on the requisition of counsel for the landlord, they stated the following question for the opinion of the Court of Appeal:—

Whether, under the 1st section of the Land Law (Ireland) Act, 1887, the landlord was entitled to obtain an order, authorizing her to resume possession of the said holding for the purposes of a home-farm in connection with her residence.

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The points raised in argument, and the sections of the Land Law Acts, and rules of the Land Commission, which were referred to by counsel, are fully noticed in the Judgments.

WALKER, C.—If this case turned on the point whether the landlord is excluded by the rules framed under the Act of 1887, I think we should probably not allow the case in any event to go off on such a point ; but I think the rule of August, 1887, is capable of a construction which will make it workable. It says : “The subsisting rules in relation to applications by landlords to resume possession of holdings shall apply to like applications to resume possession of leaseholds, so far as such right of resumption exists under the Land Law Act, 1887.” I think that rule may be applied to an originating notice under the Act of 1887, without saying that the landlord was bound to apply within the time mentioned in the rules of 1883 ; that is to say, that he was bound to apply within the last three months of the lease, or within three months after its expiration. It would seem that the rule of 1887 was framed with a view to such a question as arises in the present case.

But on the main question we are of opinion that the Judgment of the Land Commission is right. The tenant was a lessee under a twenty-one years' lease, dated 30th September, 1867, which expired on the 1st May, 1888, and he served a notice to fix a fair rent on the 27th September, 1887, while the lease was existing ; and the landlord, on the 14th November, 1887, served notice of an application to resume possession of the holding for the purpose of a home-farm. The lease expired on the 1st May, 1888, and the landlord's application did not come on to be heard till the 23rd July, 1889. That application was dismissed. The question is, What is the construction of the 1st section of the Act of 1887, taken in connection with the 21st section of the Act of 1881 ?

By section 21 of the Act it is enacted :—" At the expiration of such existing leases, or of such of them as shall expire within sixty years after the passing of this Act, the lessees, if *bond fide* in occupation of their holdings, shall be deemed to be tenants of present ordinary tenancies from year to year, at the rents and subject to the conditions of their leases, respectively, so far as such conditions are applicable to tenancies from year to year." The moment the lease comes to an end, that moment they assume a different *status* ; they shall "be deemed" to be tenants of ordinary tenancies from year to year. But then a right is given to the landlord, that if the landlord wants to resume the holding for any one of three purposes, as a residence for himself, or as a home-farm in connection with his residence, or for the purpose of providing a residence for some member of his family, the Court may authorize this to be done ; but the manner is prescribed by the 5th section. Then follows a proviso, that if the holding so resumed shall be, at any time within fifteen years after such resumption, re-let to a tenant, the same shall be subject, after being so re-let, to all the provisions of this Act. This proviso was put in as a guarantee on the landlord's part that he would not take it up, and then re-let it immediately. Then comes section 1 of the Act of 1887, under which lessees can get a fair rent fixed. That section applies to leases expiring within ninety-nine years after the passing of the Land Law Act, 1881, and to any lease existing at the passing of the Land Law Act, 1881, for any life or lives then existing, with or without any term of years not exceeding ninety-nine years where such term is concurrent, or thirty-one years where such term is in reversion. If a tenant had a lease of one of these kinds, he could, under this section, convert it into a present tenancy from year to year, provided he served a notice before the prescribed date. The words "deemed to be" must

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mean the *status* acquired by the making of the application, and involve a right of resumption as mentioned in the Act of 1881, and probably also the resumption for the same purposes. Under such circumstances the Court can authorize resumption. But I can well understand that a hardship would arise in the case of a man who had a lease which would not expire, say, till 1980, if he was to be obliged within two years to accelerate its expiration, and the consequent possibility of resumption; and, therefore, a proviso is attached to section 1, that, in case of the lessee acquiring this *status* of present tenant by serving his notice, the Court shall not, for fifteen years, authorize resumption by the landlord under this section—a clause probably suggested by the clog upon the landlord's rights contained in the proviso attached to section 21.

I cannot follow the argument that this proviso only applies to the case of a lessee whose term would in its natural course outlast fifteen years. It does not suit the words, because the prohibition is against authorizing resumption under this section. That must mean the same right of resumption as is mentioned in the earlier part of the section, and thus we are remitted to the Act of 1881. There is but the one right of resumption to be exercised; but where the tenant applies under the Act of 1887, the right is stayed in its exercise till fifteen years after the tenant has transmuted his possibly long lease into a yearly, though present, tenancy.

We, therefore, answer the question in the negative by stating that the landlord is not entitled to obtain an order to obtain possession; but this order will be without prejudice to her right to apply to the Court, at the expiration of fifteen years after the tenant has become a present tenant, to authorize such resumption.

FitzGibbon and Barry, L.JJ., concurred.—L.R.I., xxxii., 97.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
June 7,
1887.(Before LORD ASHBOURNE, C., SIR MICHAEL MORRIS,
C.J., and FITZGIBBON and BARRY, L.JJ.)**Erskine v. Armstrong.***Executory agreement for lease—Date referentially fixed.*

An agreement in writing between A and B, that on paying £20 B was to get possession of a farm of land and also a lease for twenty-one years, at the yearly rent of £16 a-year; and that B, on giving up possession at the end of twenty-one years, having done no injury, was to get his money returned.

Held, to constitute a valid agreement for an executory demise for twenty-one years from the date of the payment of the £20.

Appeal from an order of the Irish Land Commission of the 21st January, 1887, giving the landlord liberty to resume possession of the tenant's holding under section 21 of the Land Law (Ireland) Act, 1881. The case in the County Court is reported, 19 I.L.T.R., 27, and in the Land Commission Court, 21 I.L.T.R., 15. The right of the landlord to resume possession depended on whether an agreement, dated the 2nd November, 1863, constituted either a valid present demise, or a valid executory agreement for a demise.

The following were, by consent, admitted facts for the purpose of appeal:—

1. On the 2nd November, 1863, an agreement in writing was duly entered into between the late Robert N. Erskine (father of the present landlord) and the late

A A

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James Armstrong (father of the present tenant), which was in the following terms :—

“ Memorandum of agreement, made and entered into this second day of November, 1863, between Robert N. Erskine, of Tullymallogue, in the County of Armagh, farmer, of the one part, and James Armstrong, of Drumderg, in the County of Armagh, farmer, of the other part, have entered into a farm of land for twenty-one years ; and the said James Armstrong, he, on paying £20 sterling, is to get possession, and also a lease for twenty-one years, at the yearly rent of £16 a-year ; and the said James Armstrong, on giving up possession at the end of twenty-one years, having done no injury, is to get his money returned to his administrators or assigns ; the same in witness whereof the parties to this agreement hereto subscribed their names the day and year first herein written.

“ Signatures, { ROBERT N. ERSKINE.
JAMES ARMSTRONG.

“ Signed in the presence of

JOSEPH WALKER.
JAMES WILSON.”

2. That all the parties who signed such agreement are dead some years.

3. That there was no direct evidence as to the circumstances under which the agreement was executed ; but the widow of Robert N. Erskine being examined, swore that, though she was not herself present at the transaction, her late husband informed her, on the evening of the day on which the agreement bears date, that he had been paid by Armstrong the £20 mentioned in the agreement on that same evening ; and she also stated that Armstrong got possession of the lands at the date of the agreement, and that he came there within a few days or a week afterwards.

4. The Land Commission Court held that that agreement was a valid agreement for an executory demise for twenty-one years, from the 2nd November, 1863.

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5. The only questions to be discussed are—

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(a) Does the agreement constitute a valid present demise, for a term of twenty-one years?

(b) Does it constitute a valid agreement for an executory demise for twenty-one years?

The Judgment of the Court was delivered by—

LORD ASHBOURNE, C.—This is a short and interesting case. It comes before us on appeal from the Land Commission on two specific questions which have been stated by them. The case arises on the 21st section of the Land Act of 1881, with which we are now so familiar, on an application by the landlord to resume possession—one of the matters provided for in that section.

Ashbourne, C.

The question arises upon the true construction of an agreement, which is set out in the case now before us—a very inartificial and clumsy document. It is admitted that the appeal must fail if this is to be considered as a valid present demise, or a valid agreement for an executory demise. There is no doubt as to the facts of the case, or as to the execution of the agreement. Two questions are sent to us as to the construction of that agreement, that is—“(a) Does the agreement constitute a valid present demise from its date, for a term of twenty-one years?” or, “(b) Does it constitute a valid agreement for an executory demise for twenty-one years?” It can be put more shortly, without going into the various points put by Mr. Campbell, and also referred to by Mr. Smith, in his very clear opening. The question is, whether this agreement comes within the decision of this Court in *Phelan v. Tedcastle* (1). We are of opinion that it does come within that authority, and that we should answer question (b) in

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the affirmative, which will amount to affirming the decision in the Court below, and dismissing this appeal with costs.

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Ashbourne, C.

It was presented to us in the argument of Mr. Smith that the case was covered by the well-known authority of *Marshall v. Berridge* (2); but though the date from which the term in the present case is not stated, *Phelan v. Tedcastle* (1) shows that it is sufficient if the document contains a reference to circumstances from which the date can be clearly ascertained; and we are of opinion that this agreement does contain on its face a reference to a circumstance clearly ascertainable, from the occurring of which the term was to begin: that is, the payment of the sum of £20.

In *Phelan v. Tedcastle* (1), a decision to which the Chief Justice was a party, Sir Edward Sullivan, C., says (page 177): "Now, the question is, whether there is, in this agreement, a date fixed, from which the term is to commence. I think, reading the language in its ordinary meaning, it is fixed. If the house was not redeemed, the defendant was to have his lease executed on the day the period for redemption expired. After that, should the term begin, the agreement provided that he was to repay and recoup all rent and arrears up to the date of the lease. The date of the lease is fixed by this. We see the defendant fixing the very time the lease was to be executed; it was to be done when the six months for redemption expires." Of course, the six months for redemption would not begin till the execution of the *habere*, a thing not fixed, but to be fixed from the circumstance, when it arose. "We think this case is clearly within the clause in the Judgment of Lord Justice Lush, that it is essential to the validity of a lease that it shall appear either in express terms, or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence; and that to hold

otherwise would be to extend *Marshall v. Berridge* (1) beyond what it decided."

Appeal.
June 7,
1887.

Here the agreement between the parties, though very inartificial, is all in writing, and provides that upon the payment of £20 the tenant was to get a lease for twenty-one years. We think that such an agreement does sufficiently fix the date from which the lease was to commence, within the authority of *Phelan v. Tedcastle* (2), and, therefore, we answer the question (b) in the affirmative.—L.R.I., vol. xx., 296.

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SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
December 3,
1891.

(Before LORD ASHBOURNE, C., PALLES, C.B., and
BARRY, L.J.)

Sproule v. Ramsey.

*Originating notice of tenant to have fair rent fixed—
Reversionary lease made bonâ fide before the passing
of the Act of 1881—Present tenancy—Land Law
Act, 1881, sections 21, 57—Land Law Act, 1887,
section 1.*

R. held lands as assignee of lessee under a lease, dated 29th September, 1866, expiring on 1st November, 1881. On 27th June, 1881, the landlord granted to him a reversionary lease for fifteen years from the 1st November, 1881, at a different rent. On 13th October, 1887, R., as lessee under lease of 27th June, 1881, served an originating notice to have a judicial rent determined.

Held (Palles, C.B., dissenting), that reversionary leases, whether to the occupying tenant or to a stranger,

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are excluded from the operation of section 21 of the Land Law (Ireland) Act, 1881; that the lease of June, 1881, was not the lease which, at the date of the passing of the Act of 1881, governed the contract of tenancy; and that the originating notice must be dismissed.

Per PALLES, C.B.—The lease of June, 1881, being made to the tenant in occupation, the tenant must be taken as holding at the date of the passing of the Act of 1881, substantially under a contract compounded of the leases of 1866 and 1881. The reversionary lease merely regulated the terms of the contract, and was not within the exception in section 21 of the Land Law Act, 1881; and, therefore, the tenant was entitled to have a judicial rent determined under the Land Law Act, 1887.—I.L.T.R., xxvi., 4.

Land Com.
November 24,
December 8,
1896.

LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Fox v. Gloster.

Land Laws—Application by landlord to declare sale void pending at the commencement of Land Law (Ireland) Act, 1896—Alienation otherwise than for consideration in money or money's worth—Land Law (Ireland) Act, 1881, sections 1, 57—Act, 1896, sections 19, 50 (1).

The Land Commission Court has no jurisdiction to set aside an alienation for consideration other than money or money's worth, although no notice of intention to alienate has been given to the landlord, where the application to set it aside was pending at the commencement of the Land Act of 1896.

In this case the landlord applied to the Court under section 1, sub-section 5, of the Land Act of 1881, to declare void a sale made by Peter Fox to Mary Grady of his tenancy in a small holding in the County of Clare, containing 8 statute acres, held under a tenancy from year to year, at the yearly rent of £8, on the grounds that he had failed to give the landlord notice of his intention to sell the tenancy, or of the name of the purchaser, or of the consideration agreed to be given for the tenancy.

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In 1890, when Miss Alicia Gloster came into receipt of the rents of the property on which this holding was situate, Peter Fox was the tenant in occupation of this holding; and the receipts for the rent were given to him in his own name until the year 1892, when he appeared to have emigrated to the United States. In 1895 proceedings to fix a fair rent of the holding were taken in the name of Peter Fox; but when the case came on for hearing before a Sub-Commission, it was proved that he was not in occupation, and by an order of the 24th April, 1895, the originating notice was dismissed. A civil bill ejectment for non-payment of rent was subsequently brought by Miss Gloster, and a decree for possession was obtained on the 17th October, 1895. An originating notice to fix a fair rent, dated the 19th November, 1895, was then served on behalf of Mary Grady, a sister of Peter Fox, claiming to be tenant of the holding; and when it came on for hearing before a Sub-Commission in the month of February, 1896, it was adjourned to enable an application to be made to the County Court to redeem the tenancy. These proceedings were afterwards taken, and a writ of restitution was granted; and on the hearing of the application for the writ a deed was produced dated the 2nd October, 1895, duly executed by Peter Fox, by which, for the nominal consideration of one dollar, he assigned the holding to Mary Grady. The present

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proceedings were then instituted by Miss Gloster, who, until the production of the deed in the County Court proceedings, had no notice of any transfer of the tenancy to Mary Grady.

BEWLEY, J.—On the hearing of the application before this Court, the case made on behalf of Mary Grady was that her mother had been the tenant, and not her brother, Peter Fox, and that she was entitled to the holding under an improved will of her mother. It appeared to me, however, that a much more serious objection existed to the application made by the landlord. The originating notice of the application to declare the sale void was served on the 26th June, 1896, and the proceedings were pending on the 15th August, 1896, when the Land Law (Ir.) Act, 1896, was passed and came into operation. Under the provisions of sec. 57 of the Land Act of 1881, “sale,” “sell,” and cognate words in that Act include alienation, and alienate with or without valuable consideration. Section 19, however, of the Land Act of 1896 enacts that “the alienation to one person only of a holding by way of mortgage or family settlement, or where marriage forms a portion of the consideration, or *otherwise than for consideration in money or money's worth*, shall be sale within the meaning of sec. 1 of the Land Law (Ir.) Act, 1881, but the provisions of the several regulations thereof other than regulation (6) shall not apply thereto;” and sec. 50, sub-sec. (1), provides that “Part I. of this Act” (which includes sec. 19) “shall, save as by this Act is expressly provided, apply to every proceeding pending at the commencement of this Act.”

I am clearly of opinion that the transaction carried out by the assignment of the 2nd October, 1895, sought to be set aside, was “an alienation otherwise than for consideration in money or money's worth.” The dollar mentioned in the consideration was not paid, and was not intended to be paid, and

the assignment was in substance a purely voluntary transfer from brother to sister of all the interest he had in the holding. If, therefore, the case comes within sec. 19 of the Act of 1896, the Court has no jurisdiction to declare the sale void, as the jurisdiction to do so arises under regulation (5) of sec. 1 of the Act of 1881, and by the express words of sec. 19 of the recent Act this is not a regulation that applies to an alienation of this description. In my opinion the very sweeping terms of sec. 50, sub-sec. 1, of the Act of 1896 render it necessary in cases pending at the commencement of the Act that the rights and obligations of the parties shall be determined in accordance with the law as altered by the several provisions of Part I. of the Act, save where such provisions, as, for example, sec. 2 and sec. 10, sub-sec. 2, are expressly prospective. From the date of the passing of the Act this Court has always held that sec. 1 of the Act, and the alterations in the law thereby made as to exemption from rent in respect of certain classes of improvements, apply to all cases pending at the passing of the Act.

The provisions of sec. 19 cannot be restricted to alienations made after the passing of the Act, and they must govern the rights of the parties in the present proceedings. Therefore, although the landlord in the present case may have been entitled to institute these proceedings at the time they were commenced, the relief sought cannot now be granted, owing to the passing of the Land Act of 1896. The originating notice must, therefore, be dismissed, but, under the circumstances, without costs.—I.L.T.R., vol. xxx., 169.

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LAND COMMISSION.

Land Com.,
Belfast.
November 6,
1896.

(Before BEWLEY, J., and Commissioners WRENCH and
FITZGERALD, Q.C.)

BEWLEY, J.—Before giving judgment in those cases heard at Armagh, in which fair rents have been fixed for a second statutory term, it is desirable to make a few observations on some of the matters discussed before us at the hearing. Under the provisions of the Land Acts the judicial rent payable during a second statutory term is to be determined by the Court on the same principles and in the same manner as judicial rents fixed for a first statutory term. The difficulty which presents itself to a tribunal fixing rent for a coming term of fifteen years is mainly the difficulty of forecasting the average conditions of agriculture likely to exist during that period. In endeavouring to come to a just conclusion upon such a matter, which, from its nature, must be more or less a matter of speculation, the tribunal would naturally turn to a consideration of the preceding years, to guide it in judging of those to come, and if there had been a long series of prosperous years, and high prices followed by only two or three bad years, or years of low prices, it might infer that the two or three bad years were exceptional, and that in the coming term of fifteen years there would be a recovery towards those prosperous conditions and prices previously existing. Those considerations we believe to have affected many of the Sub-Commissioners when fixing the rent in the two or three early years of the Land Commission ; that is to say, they did not fix them solely upon the prices or conditions then prevailing, but, on the contrary, they took into consideration the lengthened period of agricultural prosperity

existing up to 1879, and the probability of the existing depression being of a more or less temporary character. Consequently a comparison between the prices existing at the date of such rents being fixed and the present prices, would be insufficient to account, in many cases, for the difference between the rents then fixed and what may now be considered as fair rents.

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Belfast.
November 6,
1896.

Bewley, J.

It is further to be observed that some persons seem to entertain an erroneous idea that the rent of a holding should increase or decrease in exactly the same ratio as the increase or decrease in the value of its produce: for example, that if the produce decrease in value by 10 or 20 per cent., the rent should be reduced by 10 or 20 per cent. That this is not the case is obvious to any person acquainted with the elementary principles of valuation for rent; and it was stated yesterday by Messrs. M'Bride and Barnes, as valuers for the landlords, that in respect of the farms in the cases in which they were giving evidence, there had been a fall in the prices of produce of 10 per cent. since the judicial rents were originally fixed, and that this would warrant a reduction in rent about 18 per cent. It is manifest, however, that on the principles adopted by them the reduction in rent, consequent on the fall of prices, would depend on the proportion existing between the cost of production and the gross value of the produce; though stating this cost to be 40 per cent. in the cases referred to, they appear from the result arrived at to have assumed it was about 45 per cent.; and if the proportion in the cost of production were substantially greater, a much larger reduction in rent would necessarily follow. I do not refer to these matters as in any way adopting the figures stated by the valuers, but merely as evidencing an admission by them that on their principles of valuation rent does not vary in the same ratio as prices of produce. It is right also to point out that on one estate in the County Armagh, in cases in which we are about to give

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Belfast.
November 6,
1896.

judgment, the landlord's valuer estimated the fair rents of the holdings at amounts from 28 to 35 per cent. lower than the judicial rents fixed by the Sub-Commission in 1883.

County Court.
1895.

COUNTY COURT.

(Before ADAMS, C.C.J. of Limerick.)

Hurley v. Costelloe.

Ejectment on expiration of lease—Sub-division, not sub-letting, Mill-Holding.

This was an ejectment brought by the landlord for overholding after the expiration of a lease dated 1806. The lands in the lease were granted to one William Hurley, and contained 26 acres, Irish, at £2 13s. 6d. per acre. William Hurley had three sons, James, David, and William. On their marriage each son got one-third of the lands under a deed; but the only one of these deeds produced was the grant to William, the youngest son, who is now represented by Patrick Hurley, his grandson. The other defendants were a Mrs. Cagney, who represented David Hurley's portion, and Mrs. Costelloe, who represented James Hurley's interest. Both of these used to pay to Patrick Hurley one-third of the entire rent, and Patrick Hurley gave them receipts for rent in the usual form. The original lessee died without making a will during the continuance of the lives in the lease. In 1830 Patrick Hurley's predecessor sub-let an acre of land to a man named Ivors, who built a large mill and house thereon. Ivors was ejected in 1891. The mill and house had

now fallen into decay, but one of Hurley's sons used it occasionally to grind meal. No hands were employed to work the mill. Three years ago, Mrs. Costelloe's predecessor, James Hurley, applied to the Land Court and got a fair rent fixed against Patrick Hurley, who did not appear at the hearing of the case, and who apparently was not served with the originating notice. Notwithstanding the fair rent order, the old contribution was always paid, and not the new rent.

County Court.
1895.

Hurley
v.
Costelloe.

Adams, C.C.J.

The landlord contended he was entitled to obtain possession of the premises on the expiration of the lease, on the grounds that this tenancy was not agricultural or pastoral, but was a "mill-holding;" and, furthermore, that a large portion of the lands were sub-let, as was shown by the fair rent order declaring James Hurley a tenant, to Patrick Hurley, and by the receipts for "rent" given by Patrick Hurley to Mrs. Cagney. For the tenant it was argued that the transaction between the lessee and his sons was a subdivision and not a sub-letting; that any rent paid was not a "rent service" between landlord and tenant, but a rent-charge; that under no circumstances could the representatives of the youngest son have become the landlord of the elder brothers, and, therefore, the fair rent order was a nullity, and the three parties in possession were the assignees of a present tenancy. It was further argued that the mill not having been the subject of the original letting, and it now having fallen into decay, it was not a substantial non-agricultural element of the holding.

ADAMS, J.—This is a most important case, involving many questions under the Land Acts. On the first point of sub-letting, I am not bound to hold the fair rent order conclusive. The case of *Hemphill v. Frazer* decided that unless the parties were landlord and tenant a fair rent order was a nullity. In this case the whole of Patrick Hurley's title was put in evidence, and it was clear he was not the landlord of the other plots. He

County Court.
1895.

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merely collected the rent and paid it straight to the landlord. No other person was paid rent, so no other person could be held to have sub-let, and it was clear that the original lessee had divided the lands among his sons by assignment. The case of *Ireland v. Landy* decided that the assignees together constituted a present tenant if the holding was within the Land Act. The mill, no doubt, had once been a fine building, and had once been most valuable; but at the time of the passing of the Act of 1881 it was worthless and falling to ruin. No similar case had arisen before.

Held, that the presence of the old mill did not make the holding non-agricultural, and the ejectment was dismissed.

[Not reported.]

LAND COMMISSION.

Land Com.
December 10,
1895.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Boyd v. Tredenick.

Landlord and tenant—Sub-division of holding—Separate holding—Right to have fair rent fixed—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), section 2; section 20, sub-section 1.

J. M., a tenant from year to year of a holding to which the Land Act of 1881 applied, sold in 1887, with the permission of the landlord's agent, a part of the holding, consisting of 14 acres. The purchaser's name was entered in the landlord's books as tenant of the 14 acres he had bought, at an apportioned rent of £3. There was no consent in writing by the landlord to the sub-division of the original holding.

Held, (1) that the landlord was estopped from alleging that the 14 acres did not form a separate holding ; and (2) that the present tenancy in the 14 acres, subsisting at the time of the sale, had not been affected by the acts of acceptance, admission, or transfer, constituting the purchaser a tenant ; and that the order of the Sub-Commission, fixing the fair rent, should be affirmed.—*Irish Reports*, 1896, vol. ii., 364.

Land Com.
December 10,
1895.

Boyd
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Tredenick.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
November 2,
1891.

(Before LORD ASHBOURNE, C., FITZGIBBON and
BARRY, L.JJ.)

Kennedy v. Essex.

Bonâ fide occupation—Sub-letting—Trivial sub-letting—Consent on part of landlord—Non-enforcement of covenant against sub-letting—Tenant not bonâ fide in occupation at date of originating notice—Estoppel—Land Law Act, 1881, sections 21, 57—Land Law Act, 1887, section 4.

In 1873 E. by lease demised lands, on which there stood six houses, to K., at a rent of £300 13s. The lease contained a covenant against sub-letting without the consent in writing of the lessor, and a covenant to repair and rebuild the houses existing on the lands. The houses were rebuilt by K., pursuant to the covenant, and re-let without consent in writing, to sub-tenants other than those in occupation at the date of the lease. The lessor had knowledge of those sub-lettings, but took no steps to enforce the covenant. One of the houses was a public-house. The total rent

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of the sub-lettings at the date of the hearing of the case was about £18. At the date of the service of the originating notice there was, also, a sub-tenant in occupation of two acres, at a rent of £8 yearly, who gave up possession to the tenant one week before the application was heard in the County Court.

Held, (1) that the sub-lettings were not of a trivial character ; (2) that mere negative inaction on a landlord's part in reference to sub-letting cannot be construed into active consent ; and (3) that if a tenant is not *bond fide* in occupation of his holding when the originating notice of application to determine a judicial rent is served, he cannot subsequently acquire an occupation to satisfy the Land Law Act, 1881.

Per FitzGibbon, L.J. : In *Keating v. Bolton*, 22 L.R.I., 143, the dealings between the landlord and the tenant precluded the former from denying his consent to the sub-letting.—I.L.T.R., vol. xxvi., 7.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
February 27,
1892.

(Before LORD ASHBOURNE, C., PALLES, C.B., and
FITZGIBBON and BARRY, L.JJ.)

Robinson v. Wakefield.

The Sub-Commission (Tuckey, A.L.C.) dismissed the originating notice. The Land Commission reversed the decision. On Appeal by the landlord the Court discharged the order of the Land Commission, and affirmed the decision of the Sub-Commission.

Lease for years—Covenant against sub-letting—Sub-letting Act (7 Geo. IV., c. 29)—Landlord and Tenant Act, 1860, sections 9, 18—Land Law (Ireland) Act,

1881, sections 2, 5, 15, 21, 57—*Land Law (Ireland) Act, 1887, section 4—Landlord's consent—Consent in writing—Presumption of lost deed—Trivial sub-letting.*

Appeal.
February 27,
1892.

Robinson
v.
Wakefield.

The interest in a lease comprising 54 acres, made in 1828, was assigned to the tenant in the year 1878 by a deed, describing the premises as "now in possession of W. (the assignor) and his under-tenants." At this date portions were sub-let to A, B, C, D, E, and F. The landlord's agent endorsed on the deed his assent to this assignment.

Held, that this was a sufficient evidence of a consent by the landlord to the sub-lettings in existence at the date of the assignment.

The tenant subsequently got the portions of land held by A, B, and C into his hands, and re-let them to X, Y, and Z, respectively, without any fresh consent on the part of the landlord. The tenant also made a new sub-letting to G of 2 acres at £4 per annum.

Held, that these several sub-lettings should be taken together, and were not trivial.

The landlord's predecessor had authorized the lessee to make sub-lettings, and neither the landlord's predecessor nor the landlord had ever availed themselves of a condition contained in the lease giving a penalty for sub-letting, nor of the provisions of the Sub-letting Act, though it was proved that they knew of the sub-lettings.

Held, that the Court would not presume a lost deed waiving the benefit of the provisions of the Sub-letting Act.

LORD ASHBOURNE, C.—This is an appeal from an order made by the Land Commission in reference to a holding held under a lease dated 29th February, 1829, whereby Thomas Christy Wakefield demised certain lands to James Woodhouse, to hold for the term of two lives or thirty-one years. The notice to fix the fair rent shows that the holding contains 54 acres, 3 roods, 22 perches, and is subject to a rent of £58 15s., the gross

Ashbourne, C.

Appeal. Poor-law valuation being £56 15s. When the case
 February 27, came before the Sub-Commission, presided over by
 1892. Mr. Tuckey, it was dismissed by him, on the grounds
Robinson that the tenant was not in *bond fide* occupation of his
 v. holding. An appeal was then taken to the Chief Com-
Wakefield. missioners, who reversed the order made by Mr. Tuckey,
 Ashbourne, C. Mr. Justice Bewley being of opinion that, owing to
 certain decisions of this Court, on which he put that
 interpretation, he was bound to hold that the landlord
 had, in fact, consented to the sub-lettings that had been
 made by the tenant. From the order of the Land
 Commission an appeal has now been brought to this
 Court.

The facts on which the question turns do not need any lengthened statement. The lease under which the lands are held was made in the year 1828—an important date, having regard to the sub-letting code, for the 7th George IV., c. 29, was then the governing statute, and it grasped all leases made between 1826 and 1832. It appears that from time to time, from the making of the lease till the year 1878—a most important date in the case—various sub-lettings of his holding were made by the tenant, though without any written consent on the landlord's part. The importance of the date 1878 is this, that in that year Thomas Atkinson Woodhouse, who then owned the lessee's interest, assigned the lands by deed to the respondent, with the consent of the landlord's agent to the assignment testified by the requisite endorsement. In the deed of assignment to which the landlord so consented, the lands were described as being "in the actual possession of Thomas Atkinson Woodhouse and his under-tenants;" and we have been pressed in the argument to hold that it would be unreasonable to allow the landlord to invalidate the tenant's right to go into the Land Commission in respect of any sub-lettings which occurred antecedent to this transaction. In this contention

I entirely agree. I do not think it is competent for the landlord to rely on any of the antecedent sub-lettings so as to impose any disability on the tenant. I, therefore, confine my Judgment to what occurred between the 24th April, 1878, the date of the assignment, and the 31st October, 1887, the date when the tenant served his originating notice seeking to get the benefit of the Land Act passed in that year. I give the tenant the right of treating everything that occurred before 1878 as absolutely cured and condoned by the landlord's consent to the assignment. But I do not think that consent can be pressed any further than that. In other words, I treat the endorsement of the consent upon the assignment of 1878 as curing everything in the past, but not as conferring a charter for the future. The legal effect, therefore, of everything up to that date must be viewed in the light of that assignment and consent; but for everything that has occurred since then the lease of 1882 must be looked to in order to ascertain the rights of the parties.

Now, what has occurred since 1878? Admittedly since that date the sub-letting to John Robinson of 2a., at a rent of £4, has been made by the tenant without consent of any kind on the part of the landlord. But the case does not rest there, because it appears there are three other holdings, previously occupied, it is true, by other sub-tenants, which have been given to fresh sub-tenants by the tenant, on exactly the same conditions as that of Robinson. The position is, therefore, this: the tenant has, since 1878, created four sub-lettings, using that word in its popular sense, and is thus not in physical occupation of his entire holding. Now, "occupation" is the governing and cardinal word of the entire code of Land Acts. It is only the tenants who are in occupation of their holdings whom the Legislature intended to benefit by those Acts. The tenant here, therefore, is bound to account in some

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adequate way recognised by law for portion of his holding being in the occupation of others. This he has attempted to do in two ways. First of all, he alleges—though not very boldly, still he alleges—that these four sub-lettings are trivial. Well, assume, for purposes of argument, that any one of these sub-lettings is trivial, it is impossible for anyone to say that the four taken together are of a “trivial character.” I utterly decline to lay down—and no Judge, so far as I am aware, has attempted to lay down—any particular acreage or rent as being the limit which a sub-letting cannot exceed without ceasing to be of a “trivial character.” It is not altogether a question of proportion, but each case must be judged by its own circumstances. Some words from my own Judgment in *Kennedy v. Essex* (1) have been quoted during the argument. I said there, at p. 590: “The total of the rents of the sub-tenants amounts to 6 per cent., a substantial portion of the entire rent paid by the tenant to the landlord.” But I never intended to suggest that such a proportion was to govern the Court in all other cases. In that case I found that the rents received by the tenant out of the sub-let portion of his holding amounted to over £18 a-year—a substantial sum, and a considerable item taken by itself absolutely and without any regard to percentage. Of course, in the case of a small holding, 6 per cent. of the rent paid to the landlord would bring out an entirely different result as far as amount goes, so that it is plain we must take each case as we find it, and decide it on its own circumstances. In this case, indeed, it has hardly been put forward that the Court could look upon the four sub-lettings taken in the aggregate as of a “trivial character.” It has rather been suggested that we should take each sub-letting by itself, and that so viewed each sub-letting was in itself trivial, and formed no obstacle to the tenant’s claim. But it is not possible for us to treat the sub-tenancies in this way. The facts of this

case show that a substantial portion of the tenant's holding is the subject-matter of the four sub-lettings that have been created since 1878 ; and, accordingly, I put aside the contention that these sub-lettings are trivial as not commending itself to my mind. Secondly, the tenant has endeavoured to prove his right to come within the Act, by attempting to show that he has had the landlord's consent for what he has done. He does not, indeed, allege any specific consent, much less the consent in writing, which the lease contemplates ; but he says that, looking broadly at the facts as they exist, they amount, as a matter of fact, to a consent given by the landlord to the sub-lettings that have been made, and that, therefore, they are cured from any infirmity which might otherwise attach to them. He has contended that the landlord, by his conduct, must be taken to have actually assented, if not to the sub-tenancies of those persons to whom the lands are now sub-let, at least to the tenant having parted with the occupation of the portions so sub-let. I would observe at once that this contention cannot apply to the case I have already mentioned—the sub-letting to John Robinson of 2 acres, at £4 a-year. There is no vestige of evidence of consent by the landlord to that. Next, I take this contention as applied to the remaining cases. I have read the evidence with much attention several times. It is very meagre ; it leaves out dates and omits circumstances which, if stated, might probably have been useful, though not more useful, perhaps, to the landlord than to the tenant. If the evidence of Thomas Atkinson Woodhouse, the late tenant, had been as it is briefed, I could understand the tenant being able to place reliance on it. But it turns out that a mistake has occurred in the transcription, and that a conversation of great interest and importance, which appears in the note of the evidence as having taken place five years ago, is really a much more ancient matter, as a

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"three" has been left out before the "five;" and that the real date of this conversation must be put down as thirty-five years ago. It, therefore, took place long before 1878, the date at which I treat all previous infirmities as cured by the assignment and consent thereto, and in no way aids the tenant in removing the difficulties which the events since that date have created for him. Concentrating my attention on the evidence, so far as it deals with what has occurred since 1878, I do not find there is anything to lead to the conclusion that there is here, as the tenant must establish there is, according to *Maconchy v. Robertson* (1), active as distinguished from passive consent on the part of the landlord. There may be evidence from which the knowledge of the landlord may be inferred, and his standing by, and there may be something in some of the cases that would amount almost to acquiescence. But there is nothing that I can see amounting to evidence of the active consent that is required, assuming it to be a case in which acts are to be looked to, in order to ascertain the state of mind of the landlord.

How, then, does the position of the tenant stand in the present case? Sub-letting is not a matter which the Legislature has ever lightly regarded or assumed to be favourable to the tenant. On the contrary, all legislation on the subject shows that the tenant who embarks in sub-letting does so at his peril. He is admonished over and over again in every Act of Parliament—whether Land or Purchase Act—that it is to the consent of the landlord to which alone he can look to validate what he is doing. He is admonished over and over again that if he sub-lets he is doing something which in itself is not to be considered lightly, but something which requires on his part great care and circumspection, in order to see that he has that consent of the landlord which alone can fortify his conduct. Neither 7 George IV., c. 29, nor Deasy's Act shows any greater favour to

sub-letting than to assignment ; and it is well known how strictly the provisions of those statutes against assignment without consent have been construed. Nay, more, we find that though the Legislature has by two recent statutes, 51 & 52 Vict., c. 13, and 52 & 53 Vict., c. 59, enabled evidence of consent of a general character to validate assignments which otherwise by statute or agreement required the consent to be given in a particular form, yet that relaxation has not been extended to the case of sub-lettings. Thus, though the absolute necessity for consent in writing has been got rid of in the case of assignment, up to the present the Legislature has not seen fit by a special enactment to interfere with the necessity of having the strictest evidence of the landlord's consent to a sub-letting that is otherwise prohibited, evidently regarding it as one of the safeguards of occupancy.

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Having said this much, I have said enough to support the conclusion at which I have arrived, because if the sub-lettings are not trivial, and if, as a matter of fact, there is nothing amounting to that active consent upon which the tenant relies, it is obvious that in substance and in reality he has no argument to address to us. It would be only in the contingency of powerful and persuasive evidence of active consent being offered to us that the further question would arise, whether the evidence of any acts and words could be regarded without the further element required, under the terms of the statute and of the lease, that the consent should be in writing. Being of opinion that there is no material in fact to support the tenant's contention, it is unnecessary for me to go further, and accordingly, without offering any opinion on this further question, I am of opinion that the order of the Land Commission is erroneous and should be reversed, and that this appeal should be allowed with costs.

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PALLES, C.B.—It is unnecessary for the decision of this case to determine whether *Bowman v. Catherwood* (1) was rightly decided. The discussion, however, of that case here has had one satisfactory result: it has shown that the decision of this Court in *Keating v. Bolton* (2) was one which depended upon its particular facts, and which did not determine the important question which was afterwards decided in the Exchequer case. I pass, therefore, from that case, with the single observation that during the argument here I have not heard anything sufficient to induce me to alter, or even to modify, the opinion which I there expressed.

I divide the sub-tenancies here into two classes—those created—(a) before, and (b) after the assignment of 1878.

As to the first class, I entertain the clearest opinion that the landlord, by consenting in writing to that assignment (by which the lands were granted expressly subject to existing tenancies), estopped himself from alleging that such sub-tenancies were not valid in law. I desire, however, to guard myself against determining, although in favour of the tenant I assume, that such estoppel involves the further estoppel that the sub-lettings were made with his consent within the meaning of section 57 of the Land Act of 1881. It may be that it would do no more than estop him from alleging that the lands were held under a lease prohibiting sub-letting without consent; but as the facts of this case do not necessitate the determination of that question here, I prefer not to express any opinion upon it. I put wholly out of consideration all the sub-tenancies created prior to the date of the assignment.

There remain, however, the sub-tenancies of the second class, viz.:—Robinson's, of 2 acres, at £4 a-year; Cole's, of 1 acre, 3 roods, at £4 a-year; Tomlinson's, 1 acre, at £2 12s. 6d. a-year; and Clifford's, the acreage of which is not stated, at £3 a-year. I am

satisfied upon the evidence that the landlord did not consent to any of these sub-tenancies in the sense in which *Maconchy v. Robertson* (1) decides that that expression is used in section 57 of the Act. The rents of these sub-tenancies amount in the whole to £13 12s. 6d. a-year; and the acreage, calculating Clifford's to be at the same acreable rent as the others, would be about 6 acres. The entire farm contains 54 acres, and it is held at a rent of £58 15s. In reference to such a letting, it is impossible to contend that the sub-lettings, taken as a whole, are trivial; and the question is whether we can take them together, or whether the sub-letting to Robinson, which possibly might by itself be considered trivial, is alone to be taken into consideration. This depends upon whether the tenant here is to be taken to be in the same position, in reference to the sub-tenancies of Cole, Tomlinson, and Clifford, as if they had been created before the assignment of 1878. The evidence is that the plots of ground included in those tenancies were under-tenancies in 1878, but were afterwards re-let by the middleman, the present tenant. The argument for the tenant is, that from the acts of the landlord's predecessor, we ought to presume a grant by deed authorizing the tenant to sub-let, whenever he thought fit, either the entire of the lands or at least such portions of them as were under-tenancies at the date of the assignment of 1878. I am of opinion that such a presumption is much wider than any which we are warranted in making. I would be quite prepared to presume anything that was necessary to render lawful the tenancies existing in 1878; but it is one thing to consent to one sub-letting of a particular parcel of land, and a wholly different thing to consent to the tenant being at liberty to let and re-let such plot from time to time, whenever the former tenancy therein shall expire. Had each of the particular acts of sub-letting which took place before 1878, been accompanied by the

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consent in writing prescribed by 7 Geo. IV., c. 29, that Act would still prevent us from inferring from those acts a *general* waiver of the benefit of the Act, even in reference to the particular parcels included in the sub-letting; and I cannot see that the presumption which I am willing to make of the validity of the sub-tenancies, can support any further inference of fact than could be drawn from such validity having been actual, instead of presumed.

FitzGibbon,
L.J.

FITZGIBBON, L.J.—All the evidence given in this case of the landlord's conduct respecting the portions of the holding of which the tenant is not in occupation amounts only to this: (1) evidence of consent to the sub-lettings made prior to 1878, in that the assignment then made to the present tenant recognised those sub-lettings, and the landlord assented to that assignment; and (2) evidence of acquiescence by the landlord in the sub-lettings made since 1878, either by re-letting lands formerly sub-let, or, as in Robinson's case, by a new sub-letting of land not previously sub-let. I assume for the purposes of my Judgment that the evidence goes so far as this.

The landlord has made no attempt to take advantage of these sub-lettings in order either to defeat the lease or to enforce the penalties. Possibly the evidence that has been given might be available to prevent him from succeeding if he were to take any such proceedings. But he is not making any such attempt now. The tenant is the moving party; the landlord is only insisting that the tenant is not *bond fide* in occupation of the holding.

Admittedly, the tenant is not actually in occupation of all the holding; but he contends that he has imputed to him a *bond fide* occupation with respect to the portions sub-let. To establish this case he must show that, so far as he is not in actual occupation, he has sub-let with the landlord's consent. The burden of proof is on the

tenant ; and the best we can do for him, I think, is to treat every clause penalizing or prohibiting sub-letting as struck out of the lease, and out of the Act of Parliament, which, owing to its date, applies to the lease. Yet that is not enough : it only leaves the tenant in the plight of having made sub-lettings to which the landlord has made no active objection, but to which he has given no active consent. We have decided in two or three cases that this state of facts is not sufficient to validate the tenant's position.

A tenant who is under neither prohibition nor penalty may sub-let if he likes. If he sub-lets the entire holding, the occupying sub-tenant, on the expiration of his lease, is the only person who can claim the benefit of the Land Acts. If he has sub-let part only, there will, when the lease expires, be no tenant in occupation of the whole, unless, before the lease expires, he gets up the sub-let portions into his own possession.

It appears to me that no distinction on either the policy or the terms of the Acts of 1881 and 1887 can be drawn between the three new sub-tenancies created in lands which had been previously sub-let and Robinson's case, to which as a sub-letting for the first time no answer has been attempted. Instead of letting in new sub-tenants on the expiration of the previous sub-tenancies, the tenant might, if he liked, have retained these portions of the holding in his own possession, and so have been, actually or imputedly, in *bond fide* occupation of the entire, the landlord having consented to the other sub-lettings which still continue. But the tenant did not adopt this course ; he sub-let these three portions to new tenants without procuring the landlord's consent ; and nothing has occurred since that I can see, except that the landlord has acquiesced in the occupation of the sub-tenants without enforcing the penalties or proceeding to restrain the sub-letting. But more than acquiescence is necessary if we are not to hold that

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a tenant prohibited from sub-letting and violating the prohibition is to be better off than a tenant who is under no prohibition, and who sub-lets without his landlord's consent.

BARRY, L.J.—I have some doubts on some points of the case, but not sufficient to induce me to dissent from the decision arrived at. Of course, I concur in saying nothing one way or the other on the abstract question raised in *Bowman v. Catherwood* (1). It is a very wide and far-reaching question, and there has been a well-considered Judgment on it lucidly delivered by the Lord Chief Baron, and reported in a recent number of the Reports. But I certainly should not wish to express any opinion upon so important a subject without having an opportunity of further considering my Judgment. In the present case, as was intimated at a very early stage of the argument, we are all of opinion that as regards the sub-lettings made here prior to the assignment of 1878, it is impossible for the landlord to rely upon these sub-lettings as a reason for excluding the tenant from the benefit of the Land Law (Ireland) Act, 1887. It has been contended that the conduct of the present landlord's predecessor in title, followed by the assignment assented to by the present landlord himself, has amounted to a complete release of the benefit of the 7 Geo. IV., c. 29, so far as regards sub-letting. But I confess that I am unable to accept that argument as well founded. I am of opinion as regards all that occurred before the assignment of 1878, that if there were breaches of the Sub-letting Act, they were condoned; not that the provisions of the Act were effaced or abrogated in any way, but simply that the present landlord and his predecessor in title have put themselves into such a position that the Court should not permit them to rely upon these sub-lettings as a ground either of attack or defence.

Then we come to consider the case of the four sub-

lettings that have been made since 1878. It has been rather assumed, I think, by the Lord Chancellor, the Lord Chief Baron, and Lord Justice FitzGibbon, that as regards three of these sub-lettings, that is, those made in respect of lands which had been previously sub-let, the legal position of the tenant was precisely the same as regards the fourth, that to Robinson, which was a new sub-letting to a new sub-tenant of lands that had never been let before. No doubt, these three were new lettings; the old tenants had either gone or been put out, and the mesne tenant let the portions of land so left vacant to new sub-tenants. Still, I confess that I am not at all prepared to hold that such sub-lettings may not be supported as being sub-lettings with consent within the 57th section of the Land Law (Ireland) Act, 1881, by reason of the fact that they were only re-lettings of premises that had been lawfully—at all events so far as the position of the landlord was concerned—lawfully sub-let previously. It seems to me to be a totally different thing to re-let a plot of ground which had been previously in the hands of sub-tenants from sub-letting new portions of the farm that never had been sub-let before. However, any opinion of mine now, even if I were prepared to give a decision, would be of no avail as regards altering the decision of the Court. But the difficulty I feel in this matter leads me to another branch of the case, that is, the argument as to the triviality of the sub-letting. The way, as I understand it, in which my learned colleagues get over the excuse that has been put forward on behalf of Robinson's sub-letting—viz., that it is trivial—is by grouping it along with the three new sub-lettings of lands that had been previously sub-let. Well, of course, if, as I have suggested, these three sub-lettings may stand on a different footing, it would seem to my mind that the grouping of them and Robinson's sub-letting together is not a satisfactory mode of disposing of the

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excuse which has been offered in favour of that sub-letting. However, as my colleagues have given their opinion, I will not dissent on the question of triviality.

On the whole, though I feel there are many questions in the case which give rise to doubts in my mind, I will not dissent from the conclusion at which the Court has arrived.—L.R.I., xxx., 547.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal
May 17,
1893.

(Before WALKER, C., SIR PETER O'BRIEN, C.J.,
FITZGIBBON and BARRY, L.JJ.)

Mulcalre v. Lane-Joynt.

*Landlord and tenant—Application to fix a fair rent—
Bonâ fide occupation—Sub-letting—Triviality—Con-
sent—Statutory limitations—Continuance of tenancy.*

A., in 1863, demised certain lands to M., for three lives. At the time of the demise A.'s agent insisted that G., who was in occupation of 4 acres, 3 roods, 30 perches, Irish, of the said lands, and paying rent therefor to M.—should be "taken on" as sub-tenant to M., at £4 10s. rent. G. died in 1870. No administration was taken out to G. G.'s only son had a fair rent fixed.

Held (Sir Peter O'Brien, C.J., diss.), that what took place in 1863, when the lease was made, was a consent to the sub-tenancy of G.; and that the Statute of Limitations did not operate to create a new tenancy in G.'s son so as to over-ride that consent.

Per Sir Peter O'Brien, C.J., that the Statute of Limitations created in favour of G.'s son a new sub-tenancy

under M.; that there was no consent thereto by the landlord; and that the sub-letting was not trivial within sec. 4 of the Act of 1887.

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The area of the holding was 239 acres, 2 roods, 14 perches, held under a lease of date 19th June, 1863, made by Colonel Montgomery to Catherine Mulcaire, at a rent of £316 19s. The Mulcaire family had been tenants since 1853, and there was in that year on the lands a sub-tenant, father of the present sub-tenant, J. Guerin. Colonel Montgomery served a notice to quit on Mrs. Mulcaire, and also on the sub-tenant. The agent (Mr. Harte) came to the premises and insisted that Guerin should not be cleared out by Mulcaire; and also that the rent to be paid by Guerin should be £4 10s.; and these were to be amongst the terms of the new letting. A fine of £633 16s. was the consideration for the lease of 19th June, 1863. The lease demised all that parcel of land of Aghanish East and Aghanish West, containing an estimated acreage of 241 acres, 3 roods, 8 perches, statute measure, with all the houses and buildings thereon, situate in the Barony of Shenid, County of Limerick. There was no covenant against sub-letting. In 1890 Guerin died. There was no evidence of the circumstances in which the son, James Guerin, was treated as successor to his father. The Sub-Commission Court (Edge, A.L.C.) fixed the fair rent of the holding at £220. On appeal the Land Commission held that as to 4 acres, 3 roods, 30 perches, the tenant was not in occupation, and the originating notice was dismissed.

WALKER, C.—I am coerced upon the evidence to hold that the sub-tenancy of Guerin, in 1863, is referable to a consent by the landlord, and the frame of the lease is strongly corroborative of that view. We have a new start both as to the lease and the sub-letting. It does not appear whether any administration was taken out to old Guerin, nor whether there was any other

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next-of-kin besides James. We have simply the fact of the death of the father, and the possession by James Guerin now. It is said that, in any event, James Guerin, if he acquired a title, did so in 1882, under the Statute of Limitations, and that this was a new sub-tenancy to which there could not be attributed the consent of the landlord, Mr. Joynt, who had purchased from the Montgomeries. In support of this, the case of *Jackson v. M'Master* (28 L.R.I., 176) has been cited, and has been presented in a light that renders *M'Carthy v. Swanton* (18 I.L.T.R., 85) applicable. I think the decision in *Jackson v. M'Master* is undoubtedly right. But in this case we have no evidence of any act *in pais* done as regards James Guerin; he appears to have remained on as sole next-of-kin, and to have paid rent and to have been dealt with as being in his father's shoes. When the statutory period ended, it seems to me that James' beneficial title became confirmed in the extinguishment of all other rights against the yearly tenancy of his father, so that James, the son, obtained a Parliamentary conveyance of the tenancy. Everyone is familiar with the practice by which such a dealing in Ireland is treated as a continuance of the old tenancy, and for all purposes. Assuming that there was a consent to the tenancy of old Guerin in 1863, this consent enured for the tenancy of Guerin, the son, inasmuch as the conditions imposed in 1863 were that the Guerins were not to be disturbed. The evidence does not bear out the suggestion that in 1863 a new rent was created against the Guerins. It was a year afterwards, when the rent of the Guerins was made £6. There is, I think, evidence of a consent by the landlord to the continuance of the former sanction for the benefit of the son. The case must be sent back to the Land Commission to have a fair rent fixed, and the order of the Land Commission must be reversed.

FitzGibbon and Barry, L.JJ., concurred.

Sir Peter O'Brien, C.J., dissenting.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before WALKER, C., and FITZGIBBON and BARRY,
L.JJ.)

Appeal.
December 12,
1893.
February 2,
1894.

White v. White.

*Lessee in bonâ fide occupation—Sub-letting to labourers—
Sub-letting of a trivial nature—Rent paid in labour—
50 & 51 Vict., c. 33, section 4.*

W., the lessee, under a lease for three lives, was in occupation of the lands demised, which comprised 162 acres statute measure, with the exception of three small portions, sub-let to agricultural labourers. The sub-tenants were (1) L., who had a cottage and 2½ acres; (2) W., who had a cottage and 2 acres; and (3) S., who had about half-an-acre. No money rents were paid by the sub-tenants; but they gave three days' labour a-week to the lessee W., in return for their holdings. Labourers were necessary for the farm.

Held (reversing the decision of the Land Commission), restoring the order of the Sub-Commission, that the sub-lettings were trivial, and the lessee must be deemed to be substantially in occupation of his holding. Kennedy v. Essex, and Maconchy v. Robertson, referred to.

WALKER, C.—The lands are held under a lease of 10th January, 1849. The litigants are uncle and nephew, and the question is whether the lessee was in *bonâ fide* occupation of the lands when he served his notice. The existence of certain sub-tenancies is admitted, and it is not alleged that they were made with consent within the meaning of the Act of 1881. What we have to decide is whether within the meaning of section 4 of the Act of 1887 they are of a trivial

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character, and we can deem the tenant to be substantially in occupation of the holding.

The facts are not in dispute. The lands demised amount to 162 acres statute, and there are three sub-tenants. One, Linehan, has $2\frac{1}{2}$ acres; a second, White, has 2 acres; and the third, Sullivan, $\frac{1}{4}$ acre. Linehan and White have houses, and, in addition to the lands they occupy, they have certain freedoms over the lands of the landlord.

The rent payable to the tenant White is £50 per annum. No rent is payable in money by the sub-tenants. They each give three days a-week in labour as a return for their occupation. Linehan's labour is estimated at eightpence a-day, and each of the others at tenpence. They are paid in cash for their labour at the same rate for the remaining days of the week, and accounts are settled every Saturday. The lands are mountainy, furzy land, requiring a good deal of labour, and at least three labourers would be required for the working of it. If the value of the tenant's labour be estimated in money, it would be about £10 5s. per annum.

Several questions were argued before us. I am of opinion and assume that the occupation of Linehan, White, and Sullivan, was not in any case the occupation of the employer. I have read the able judgment of Mr. Trench, the Legal Sub-Commissioner, and on this point he has satisfied me that his reasoning is correct. There is a difference when a man occupies as part remuneration for his services, and when the occupation is subservient to and necessary for the service.

But the questions remain whether the sub-lettings are—(1) excluded by the terms of section 4 of the Act, 1887; and (2) whether they come within the second branch of that section as within the words "when the sub-letting is of a trivial character, and the Court deems the tenant to be substantially in occupation of the

holding." On the first point the letting to Sullivan would apparently be saved by the first branch of the section ; but that does not dispose of the question, as each of the other lettings exceeds half-an-acre in extent.

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In my opinion the second branch of the section must be deemed an independent enactment, otherwise, if there was one tenant labourer on a farm of 300 acres whose holding was three-fourths of an acre, the question of triviality under the second branch could not arise. The limitation of the half-acre must be referred to the Labourers Acts, and *qua* labourers no protection can exist when the half-acre is exceeded. But I do not think that excludes the application of the second branch, where it otherwise applies.

The application of the second branch of the section in each case depends on a question of fact, which involves a finding (*a*) that the sub-letting is of a trivial character ; and (*b*), which I think in some cases may be an addition, and is in all a sort of explanatory consequence, and a governing feature—viz., that the tenant is substantially in occupation of the holding. The main object, of course, was to get rid of the difficulty created by the cases of which *Maconchy v. Robertson* (1) is a leading example. I think, therefore, we are referred to the facts of this particular case for our decision in this, and no one case can be a certain guide for a decision on another.

The question which I propose to myself on the case is, Is the tenant substantially in occupation of the holding? He is not in occupation physically of $4\frac{3}{4}$ out of 162 acres ; but these are occupied by three labourers, whose rent for the necessary purposes of working the farm he allows to go in labour for three days of the week, and whom he pays for the three remaining days. There are weekly rents and weekly settlements. He could not usefully occupy without

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employing at least a like number of labourers. The only difference is that, instead of occupying the whole, and keeping them for six days in the week, he pays them for three, and lets their occupation go against the remaining three days. Thus the element of the necessary working of the farm, in order that the tenant may occupy usefully, taxes the place to the extent of the $4\frac{3}{4}$ acres of his own occupation. These labourers are not separately rated, and their taxes are paid by White.

It is true that the labour worth in the three cases amounts to £10 5s. per annum, and the rent is £50; but I do not think that is like the case of *Kennedy v. Essex* (1), nor do I think the case can be decided by the circumstance, for instance, that one-quarter acre of a farm was let relatively at a large rent for special reasons. Each case must depend on its own facts. In *Kennedy v. Essex* (*ante*, p. 367) (1) there were six houses sub-let—one a public-house—and also at the date of the application 2 acres at a rent of £8. Those sub-lettings were wholly foreign to the working of the farm, and on the words “substantially in occupation of the farm” I think the sub-letting in *Kennedy v. Essex* (1) should not be deemed as determining the case against the tenant in the present one.

I do not at all quarrel with the decision of the Land Commission in this case, having regard to the authorities, and I observe their decision was arrived at with doubt. Applying the test whether the tenant is substantially in occupation of his holding, I am of opinion on the facts of this particular case that he is, and, therefore, that the order of the Land Commission should be discharged, and the appeal allowed, which in effect restores the order of the Sub-Commission. The costs will follow the result.

FitzGibbon and Barry, L.JJ., concurred.—I.R., ii., 573.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before WALKER, C., PORTER, M.R., FITZGIBBON
and BARRY, L.JJ.)

Appeal.
April 24,
1894.

Ward v. Corballis.

*Acreage of holding, 161 acres—4 acres and 29 perches
sub-let—Sub-letting held to be trivial.*

*The Sub-Commission (Bailey, A.L.C.) fixed a fair rent—
The Land Commission (Bewley, J., and Wrench—Fitz-
gerald dissenting) dismissed the originating notice—
Court of Appeal reversed, and affirmed decision of
Fitzgerald, Q.C., restoring the order of the Sub-
Commission.*

The acreage was 161 acres, and the rent £204. Of this 4 acres and 29 perches—land of a poor character and separated from the rest of the holding—had been sub-let for the last forty-six years, and was now held by a sub-tenant named Michael Ward, at a rent of £7 a-year. The principal tenant paid the rates for the whole of the lands. The Sub-Commissioners reduced the rent to £170 a-year. The landlord appealed, on the ground that portion of the land was sub-let. It was contended on behalf of the tenant that the sub-letting was trivial within the meaning of the words of the Act of 1887.

Mr. Commissioner Fitzgerald held that the sub-letting was trivial; Mr. Justice Bewley and Mr. Commissioner Wrench held that it was not; and the originating notice was accordingly dismissed.

From that decision the appeal was taken.

WALKER, C., said—The view taken by Mr. Commissioner Fitzgerald was right. It had been argued by counsel for the landlord that where the tenant had such

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a holding as would give him the right to have a fair rent fixed, it could not be deemed trivial. But that circumstance would not deprive the principal tenant of his rights. It was not possible to give an exact meaning to the word "trivial." In every case in which the question of triviality arose, the proportion of the portion sub-let to the rest of the holding must be taken into account, as well as the value of the land and the other circumstances of the case. In the present instance, the sub-letting portion was found to be worth only 15 shillings an acre.

The Assistant Commissioners who inspected the land came to the conclusion that the portion sub-let was trivial and unsubstantial as compared with the rest of the holding. I think, having regard to the facts of the case, that this view, which was taken by Mr. Commissioner Fitzgerald, is right, and that the case must be remitted to the Land Commission to fix the fair rent.

Porter, M.R.

PORTER, M.R.—I am of the same opinion. The question whether any particular sub-letting comes within the 4th section of the Act of 1887 is a question of fact to be decided on the circumstances of the particular case. It must be shown, not alone that the sub-letting was of a trivial character, but also that it is such that the Court may, notwithstanding its existence, deem the tenant to be substantially in occupation of his holding.

I do not think any light will be thrown on this case by the facts of others previously decided, and I believe the decision we have now arrived at will afford but little help in like questions in future; for it is not possible that any rule can be laid down deciding what sub-lettings are trivial, so as to meet the circumstances of every case. The Legislature has, I suppose intentionally, used vague language, which the Courts must interpret as best they may.

In the present case the portion of the holding which is sub-let consists of 4 acres out of 160. It is poor land, with a wretched house on it. It lies quite detached and at a considerable distance from the rest of the holding. The sub-letting seems to have been made upwards of forty-six years ago, and has existed ever since. This shows that the portion of land comprised in it was not looked upon as an important part of the holding. If it had been thought of importance as an integral part of the farm, it would have been taken up long ago, there being no legal difficulty in the way of so doing. The fact that this sub-letting has been so long allowed to continue shows that this piece is not really workable with the rest of the holding, or at least is of no use in connection with it.

I do not wish to be taken as expressing an opinion one way or the other, as to whether in the facts of this case there was or was not evidence that the landlord had consented to the sub-letting. No such question has been raised or argued; but it would certainly seem that he, too, did not think the sub-letting of sufficient importance to induce him to interfere and prevent it.

On all the facts of the case—and the question is, as I have said, one entirely of fact—I think anyone looking merely at the circumstances I have referred to, and using the popular language of the statute in its popular sense, would be likely to describe Lawrence Ward, the tenant, as being “substantially” in occupation of the holding, and the sub-letting of this little bit of it as being “trivial.”

FITZGIBBON, L.J., in concurring said:—The Act of Parliament had expressly declined to give any measure of triviality, but had left it to be a question of degree; and the degree in one case could not be the degree in another. There was nothing but a rule of thumb to guide the Court in determining whether any part of a holding was trivial or substantial as regarded the rest of it.

Appeal.
April 24,
1894.

Ward
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Corballis.

Porter, M.R.

FitzGibbon,
L.J.

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April 24,
1894.

Ward
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Corballis.

BARRY, L.J., said :—Triviality was a question of fact, and it was not possible to lay down *a priori* a proposition capable of being applied to every case in the determination of that question. In one case 2 acres might be trivial ; in another the same quantity of land might constitute a most important part of the holding.

Appeal allowed with costs.—I.R., 1894, vol. ii., 637.

NOTE.—Section 7, sub-section 1, of the Land Law (Ireland) Act, 1896, provides that in certain circumstances if less than seven-eighths or thereabouts in value of the holding has been sub-let prior to the 23rd August, 1887, the tenant should be deemed to be in *bond fide* occupation of the holding for the purpose of the Land Law Acts.

LAND COMMISSION.

Land Com.
May 2,
1894.

(Before BEWLEY, J., and LYNCH, Commissioner.)

Clarke v. Cochrane.

Land Law (Ireland) Act, 1881—Redemption of Rent (Ireland) Act, 1891—Relationship of landlord and tenant.

BEWLEY, J.—It was contended in this case that the relation of landlord and tenant did not subsist, and on that ground, apparently, the originating notice was dismissed by the Sub-Commission. The tenant holds under a perpetuity grant, which bears date 20th April, 1842, executed under the provisions of the Church Temporalities Acts. In the case of *Hamilton v. Casey* (*ante*, p. 113), which is reported not only in the *Irish Law Times* (27 I.L.T.R., 46), but also in the *Irish Reports*, 1894 (2 I.R., 224), I decided after argument that a sub-

perpetuity grant, made under the provisions of the Church Temporalities Acts, comes within the Redemption of Rent Act. I have stated in that case the grounds of my decision so fully, that it is unnecessary to repeat them here. That decision seems to me to rule this case. In this case the grantor held under two leases, with a *toties quoties* covenant for renewal. From his immediate lessor he obtained a perpetuity grant, and thereupon gave his sub-tenant a sub-perpetuity grant. This grant was made in pursuance of the statutes, and the relation of landlord and tenant was created. However, in reversing the decision of the Sub-Commission in this case, and remitting it to them to proceed according to the statute, we express no opinion on the two questions that have been raised, in reference to which no evidence, so far, has been given—one, whether this is demesne land; *and the other, a serious question, whether the tenant is in occupation of the holding, or whether a portion of it has not been sub-let without the consent of the landlord.* These important questions it will be open to the landlord to raise before the Sub-Commission. We reverse the order of the Sub-Commission, and send the case back to them to proceed according to the statute.

This application, having been remitted to a Sub-Commission, was subsequently dismissed on the ground of sub-letting; and that dismiss was confirmed by the Land Commission (Bewley, J., Fitzgerald, Q.C., and O'Brien, Commissioner), sitting at Strabane on the 1st November, 1895.

Land Com.
May 2,
1894.

Clarke
v.
Cochrane.

Bewley, J.

Land Com.
1895.

LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Steele v. McNaghten.

BEWLEY, J.—In this case a question of sub-letting has been raised, and I think this case illustrates the hardship that sometimes occurs under the existing state of the law. It appears that the holding in this case is situated within a short distance of the road that runs from Bushmills to Portrush. Upon it there is a slated dwelling-house, and the tenant having no personal use for the dwelling-house, about the month of May, 1890, put into it a man of the name of James Beverly, who upon the evidence appears to be what is commonly called “a surface man” engaged in looking after the county road between Bushmills and Portrush. In placing this man in occupation at a rent of one shilling a week, no doubt the tenant was influenced not so much by any profit to be made by the transaction, but by the desire to have some person to take care of the house when it was not otherwise made use of. But we have it that at the time the originating notice was served this house, valued in the tenement valuation at £3 5s., was in the occupation of Beverly; the occupation was the occupation of a tenant; it was not the occupation of Mr. Steele, the present applicant. The letting under which the sub-tenant was there was made in 1890; it was not made with the consent of the landlord, nor can the tenant here call in the aid of the 4th section of the Act of 1887, inasmuch as it was a sub-letting made after the passing of the Act. In this case, after the proceedings were commenced, the tenant actually got

up possession of the house from the sub-tenant, and the landlord consequently is not damnified in any conceivable manner by the existence of this sub-letting. We have had occasion frequently, I may say, to express our regret that small technical points of this nature should be insisted upon for the purpose of depriving the tenant of the right he would otherwise have to have a fair rent fixed; and I am happy to say that in many cases such points have not been insisted upon, although they might in law perhaps have been relied on. But it is our duty to decide this case, as every other case, according to the existing law, no matter what our opinions personally may be on the subject. We are of opinion in this case that this sub-letting of the house, existing at the time the proceedings were commenced, is a bar to the institution of the proceedings and the fixing of a fair rent, and that the order fixing a fair rent must accordingly be discharged, and the originating notice dismissed.

Land Com.
1895.

Steele
v.
McNaghten.

Bewley, J.

If any relief is to be got in cases of this kind, it must be looked for elsewhere. In this particular case, having regard to what has occurred, apparently there would be nothing to prevent the tenant to-morrow from serving a fresh originating notice, and having a fair rent fixed. Having regard to the circumstances of the case, we think there should be no costs of the re-hearing.

[Not reported.]

NOTE.—See section 7, sub-section 1 (a), of the Land Law (Ireland) Act, 1896.

Land Com.
December 19,
1895.

LAND COMMISSION.

(Before BEWLEY, J., WRENCH and FITZGERALD, Q.C.,
Commissioners.)

Neill v. Macartney.

*Land Law (Ireland) Act, 1881, sec. 57 — Land Law
(Ireland) Act, 1887, sec. 4—Sub-letting.*

BEWLEY, J.—In this case the holding contains a little less than 30 statute acres. It was held under a yearly tenancy that arose on the expiration of a lease dated 1st April, 1859. By that lease there was demised a farm of land, about a half or a quarter of a mile from the village of Dervock, and a plot of land in the town. The latter was valued at £6 5s., and admittedly the house was at present sub-let to two tenants, one of whom paid 1s. 2d. a-week and the other 1s. a-week. One of these was let about four years ago, and the other about two years ago. In order to be deemed substantially in occupation of the holding, the tenant must bring himself within the 57th section of the Act of 1881 or the 4th section of the Act of 1887. Under the 57th section of the 1881 Act he should show that the sub-lettings were made with the consent of the landlord. No such case had been attempted to be put forward here. To bring him within the 4th section of the Act of 1887 it would be necessary to show that the existing sub-lettings were made before the passing of the Act of 1887, because the 4th section in terms was expressly confined to sub-lettings that were made before the passing of the Act. Here they had a house, which was a distinct and substantive part of the holding, valued at £6 5s. The Court could not disregard this altogether, and, therefore, they were obliged to hold that the case was not brought

within the statute, and the order of the Sub-Commission fixing the rent must be discharged, and the originating notice dismissed. As, however, the question of sub-letting did not appear to have been raised before the Sub-Commission, there would be no costs of the present re-hearing.

[Not reported.]

Land Com.
December 19,
1895.

LAND COMMISSION.

(Before BEWLEY, J., & FITZGERALD, Q.C., Commissr.)

Land Com.
January 20,
1896.

Robinson v. Wakefield.

Landlord and tenant—Lease made in 1828—Sub-letting—Consent by agent to assignment reciting possession of under-tenants—Receipts for rent and payments for privilege of sub-letting—Landlord at the time tenant for life—Consent in writing of heir or assign of lessor—Tenant in occupation—Sub-letting Act (7 Geo. IV., c. 29), sec. 3—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), sec. 57.

The tenant under a lease, made in 1828, and to which the provisions of section 3 of the Sub-letting Act (7 George IV., c. 29) applied, purported without deed or written instrument to make sub-lettings of portions of the holding.

By deed made in 1862 the landlord's estate was settled in trust for W., who was heir-at-law of the original lessor, and his assigns, for his life, with remainders over. The tenant was charged an additional rent for the privilege of having the sub-tenants, and in receipts for rents given in 1866 and 1867 by the agent of W. there was an item of 16s. for six cottiers. In an

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1896.

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assignment made in 1878 of the tenant's interest the lands were described as in the actual possession of the tenant and his under-tenants, and a consent signed by the agent of W. was endorsed thereon. In 1883 and 1889 fair rents were fixed on the applications of some of the sub-tenants. In an application after the death of W. to have the fair rent of the holding fixed :

Held, that W. was competent to give the consent to the sub-lettings required by 7 Geo. IV., c. 29, sec. 3, either as heir or assign of the lessor ; that there was evidence that the sub-lettings were made with his express consent ; that his consent could be given through his agent ; and that the receipts, coupled with the terms of the assignment of 1878, and the consent endorsed thereon, sufficiently testified in writing the landlord's consent to the sub-lettings.

Held also, distinguishing *Stevenson v. Parker* (*ante*, p. 93) (1895), 2 I.R., 504, that the Court would, if necessary, under the circumstances of the case, presume a lost consent in writing by W. to the sub-lettings.—I.R., 1896, 194.

LAND COMMISSION.

Land Com.
1896.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Brlen v. Tollemache.

The Sub-Commission fixed a fair rent. The Land Commission reversed the decision and dismissed the originating notice of the tenant.

BEWLEY, J.—The tenant holds 50 acres of land, about a mile from Baltinglass, and a small plot in the town, upon which there is at present a house (sub-let at £8 a-year), and the site of another house. As the sub-letting of the house was only two years ago, and, there-

fore, since the passing of the Act of 1887, the tenant cannot avail himself of the saving clause in the 8th section of that statute. It is not open to the Court to disregard the sub-letting as trivial, and they must necessarily and unwillingly discharge the order of the Sub-Commission, and dismiss the originating notice. This appears to be a very hard case; but the hardship is not one which the Land Commission has any power to remedy.

[Not reported.]

NOTE.—See section 7, sub-section 1, Land Law (Ireland) Act, 1896.

Land Com.
1896.

Brien
v.
Tollemache.

Bewley, J.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before WALKER, C., and FITZGIBBON and
BARRY, L.JJ.)

Appeal.
1893.
June 30,
July 3, 13.

West v. Huggard.

Landlord and tenant—Sub-tenant from year to year in occupation—Notice to quit—Determination of middle interest—Land Law (Ireland) Act, 1881, section 15.

D., who held an agricultural holding under W. as tenant from year to year, sub-let the holding to H. as a yearly tenant. While H. was in occupation and a present tenant within the meaning of the Land Law (Ireland) Act, 1881, W. served a notice to quit, and determined D.'s tenancy.

Held, that H. thereupon became tenant from year to year to W., and entitled to fix the fair rent of the holding.

Case stated by the Irish Land Commission for the consideration and decision of Her Majesty's Court of Appeal.

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The facts of the case and the arguments appear sufficiently from the Judgment of the Lord Chancellor.

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The following cases were cited by counsel:—*Allen v. Derby* (1); *Seymour v. Quirke* (2); *Frewen v. Smith-Barry* (3); *Roe v. Cooney* (4); *Lewin v. Eagleton* (5); *Massy v. Norse* (6); *M'Carthy v. Swanton* (7); *Inchiquin v. Lyons* (8); *Ormsby v. Crean* (9); *Dillon v. Dillon* (10); *Commins v. Barron* (11).

WALKER, C.—This case raises a most important question on the construction of the 15th section of the Land Act of 1881. Sir Raymond West holds the lands of Knockroe, in the County of Kerry, under a lease for three lives in being.

In 1876 Patrick Donovan became tenant from year to year, of 6 acres, 2 roods, 10 perches, of these lands, under the predecessor in title of Sir Raymond West, at the rent of £20; and, about the same year, Donovan sub-let the lands to Richard Huggard, at the rent of £22 10s. Previous to the 25th March, 1889, Sir Raymond West caused to be served on Donovan a notice to quit, on the 29th September, 1889, and this notice was also served on Richard Huggard.

Huggard refused to give up possession, and a civil bill ejectment was brought by the head landlord, which was served on Donovan and Huggard. This case was on January, 1890, adjourned to the sessions held in April, 1890, when a decree for possession was granted. Richard Huggard appealed.

Richard Huggard had also on the 14th March, 1890, served an originating notice to fix a fair rent on Sir Raymond West, which was dismissed by the County Court Judge. Huggard appealed to the Land Commission. The appeal from the decree in ejectment came before Mr. Justice Gibson in July, 1890, who dismissed the ejectment on the ground that Huggard was entitled to possession under section 15 of the Act of 1881. The appeal in the fair rent case came before the Land Commission at Killarney, in February, 1893.

The proceedings were then continued in the name of Julia Huggard, the legal personal representative of Richard Huggard, who had died. The case states that the Court was of opinion that the appellant was entitled to have a fair rent fixed ; but on the application of the landlord, they agreed to state a case for this Court on the question whether Julia Huggard is entitled to have a fair rent fixed under the provisions of the 15th section of the Act of 1881.

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The case, therefore, raises the net question on the 15th section in the following form :—Suppose A, owner and head landlord of the lands of Blackacre ; B, tenant from year to year to A, of the same lands ; and C, sub-tenant from year to year under a sub-tenancy created by B, C being in occupation, and a present tenant within the meaning of the Act of 1881. If A serves notice to quit on B, and determines his tenancy, does C, on such determination, become tenant from year to year to A, and entitled to fix a fair rent against him ? The difficulty arises on the words “during the continuance of any tenancy from year to year” in the first branch of the section, and the words “during the continuance of such tenancy” in the second branch. It is said there cannot be a continuing yearly tenancy in C, because it springs out of and depended on the existence of the tenancy of B, which in the case put has come to an end.

But it must be remembered that we have to construe a section of an Act which was intended to give the occupying present tenant a new *status* and new rights, and C, therefore, can *primâ facie* fix a fair rent against B, and so could B against C, if he (B) were occupying tenant ; and it seems to me that there is great reason for supposing that the intention of the section is to transfer the rights of B, who is not occupier, to C, who is, and that the section is satisfied when you have the lands, on the determination of the mesne interest, in the hands of

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an occupying yearly tenant, and that the words are equivalent to "while there is a subsisting yearly tenancy."

Let us see how far decision has carried the question. If, in the case I have put, B held the lands from A for the life of John Brown, and had demised to C for the life of the same John Brown, and John Brown died, it is settled by *Seymour v. Quirke* (*ante*, p. 272) (1)—(1) that C, whose lease had determined, would have imputed to him a yearly tenancy; and (2) that such yearly tenancy would become attached to the reversion existing in A: in other words, that there would be a "continuance" of a tenancy from year to year in C, and that A would become his landlord "during the continuance" of such tenancy, which really only commenced to exist at the point of time when the leases of B and C ended. If the imputed yearly tenant is within the 15th section, on what principle is the actual yearly tenant to be excluded?

Mr. Sandford was driven to contend that the 15th section only applied to a case like *Seymour v. Quirke* (1) which, in fact, seems to me a case stronger than the present; or (2), which is by far the most logical contention, that it only applies to a case where the yearly tenancy already bound the reversion of the head landlord. But if that be the true construction, I cannot see what object the section would accomplish, and it is certainly inconsistent with the result of the decision in *Seymour v. Quirke* (1), where the head landlord's reversion never had attached to it the occupier's tenancy. The case is quite free from the decision in *Allen v. Derby* (2), where the sub-tenant was held estopped because he had taken defence to an ejectment, and there was an existing decree against him unappealed from; and, as I understand that case, the question we have to deal with is expressly saved in *Allen v. Derby* (2). Cases for ejectment for rent are open to

different considerations, and I give no opinion upon them.

Nor is the case affected by the decisions in *Massy v. Norse* (*post*) (3), and *Moylan v. Finch* (4), which rest on this, that the party against whom the yearly tenancy was set up, claimed by title paramount; there was no existing and continuing reversion to which the yearly tenancy could be attributed; the succeeding and alleged landlord was a succeeding owner, who claimed by title paramount to the estates of all. Here it is not alleged that the estate of the superior landlord is not existing and continuing. The very point is put by Lord Justice FitzGibbon in *Massy v. Norse* (*post*) (1): "Under the 15th section, if there is a tenancy between A and B, and an under-tenancy between B and C, and if during C's tenancy the tenancy between A and B comes to an end, B's estate drops out, and, by a sort of novation, a tenancy is created between A and C in place of that previously existing between B and C; but there in each case the relation of landlord and tenant subsists between the parties."

I am of opinion that the case is ruled by *Seymour v. Quirke* (2)—a more difficult one than that before us; and further, if *Seymour v. Quirke* (2) had not been decided, that it is within the policy and the words of section 15.

FITZGIBBON, L.J.—I concur. I think this case is governed in principle by *Seymour v. Quirke* (2), and I wish to state that principle as I understand it, and to give my reasons for holding that it applies to the present case.

We have to determine the scope of section 15. Two constructions of that section have been put forward. The first and narrower construction is that it applies only to cases where the estate of the immediate landlord determines during the continuance of a tenancy from year to year, which, independently of the Land

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Act, does not drop with the middle interest, but continues on. The subsequent words, which confer the relation of immediate landlord on the next superior landlord "during the continuance of such tenancy," seem to lend great weight to this, which I may call the landlord's construction of the section. But I have already pointed out, in *Seymour v. Quirke* (2), that this argument would nullify the section. If the only subtenancies to which section 15 applies were those which would, *proprio vigore*, continue, notwithstanding that the middle interest had determined, it would be a mere platitude to say that during their continuance the next immediate landlord should come into immediate relation with the occupying tenants.

The second construction is that where the estate of a mesne landlord determines during the existence of a tenancy from year to year as between an occupying tenant and that mesne landlord, forthwith, by the operation of the section, that tenancy from year to year shall attach to the next superior estate, and the relation of landlord and tenant shall thenceforth subsist immediately between the occupying tenant and the next superior landlord, and shall continue so long as the tenancy lasts. In other words, the mesne interest falls out, and the other two parties become landlord and tenant directly as between themselves. While I think that this is the true construction, and while I believe it to be already established by authority in this Court, I do not minimize the difficulties that stand in its way, nor the fact that the Judgment of this Court by which it was laid down was not unanimous.

But the only difference between this case and *Seymour v. Quirke* (1) is this: the occupying tenant there was a lessee whose lease fell in with that of the middleman, but who, under section 21, was to be deemed to be a tenant from year to year, while here the tenant was, at the time of the determination of the middle interest, actually and in fact a tenant from year to year.

Therefore, we can make no distinction between the two cases, unless we hold that an occupier who is "deemed to be" a tenant from year to year is better off than one who actually is a tenant from year to year. I understood the decision in *Seymour v. Quirke* (1) to rest on the ground that section 21 gave the occupying under-lessee, at the simultaneous expiration of his lease with that of the middleman, the hypothetical *status* of a tenant from year to year, and that section 15 attached this supposed tenancy from year to year to the estate of the superior landlord, instead of the mesne landlord, whose lease was at an end. If this be so, we cannot give the benefit of a section to a person who is only masquerading in the statutory character of a tenant from year to year, and refuse it to the real Simon Pure.

It may be well to note the strict limits within which, so far as authority goes, this principle has been as yet recognised. In no case yet has the tenancy been held to continue, unless we have first an "immediate landlord;" second, a "next superior landlord;" and, third, a "tenant of the tenancy," who, either in reality, or under section 21, is a tenant from year to year of a holding within the Act. Unless these three characters co-exist, and unless the relation of landlord and tenant exists between each pair of them, at the determination of the mesne estate, we have not yet held that section 15 can apply. This distinguishes such cases as *Massy v. Norse* (1), where the relation of superior landlord and mesne landlord did not exist. There may be successive landlords, or owners of successive estates, or claimants by title paramount, to be dealt with hereafter, but unless they are landlords and tenants to each other, *Seymour v. Quirke* (2) and this case will not help them. It is possible that difficulties of another kind may arise where the terms of the tenancy attached by the statute to the estate of the superior landlord are, or may be, repugnant to those under which the mesne tenant held.

Barry, L.J., concurred.—I.R., vol. ii. 108.

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HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Queen's Bench
Nov. 25; 26,
1895.

(Before O'BRIEN, JOHNSON, and HOLMES, L.JJ.)

Fogarty v. Shanahan.

Land Law (Ireland) Act, 1881, section 2—Sub-dividing without consent—Statutory prohibition—Act of sub-division void, not voidable—Interpretation of condition of a bond—Prohibitions not amounting to misdemeanours.

Where the tenant from year to year of a tenancy, to which the Land Law (Ireland) Act, 1881, applies, assigned without the consent of his landlord in writing, contrary to section 2 of the statute, a portion of his holding, and entered into a bond conditioned for the payment by him, the assignor, to the assignee, of the sum of £90, the amount of the consideration paid for the assignment, in case the latter should be disturbed by reason of the statutory consent being wanting, and the assignor having subsequently ejected the assignee.

Held, that by the true interpretation of the words of the section, "shall not without the consent of the landlord in writing sub-divide his holding or re-let the same or any portion thereof," the assignment was absolutely void, and not merely voidable; and accordingly the disturbance of the assignee, the plaintiff, by the assignor, the defendant, was a disturbance within the meaning of the condition, and not a mere trespass which could be remedied by legal proceedings, and the condition of the bond was, therefore, broken.

NOTE.—The case subsequently went to the Court of Appeal, which affirmed the decision of the Court below without calling on the respondents (the plaintiffs). (Rep.—I.L.T.R., vol. xxx., 30.)

SUB-COMMISSION.

(Before GREER, A.L.C.)Sub-Com.
October,
1895.**Taylor v. Cooper.**

Land Law (Ireland) Act, 1881, section 57—Bonâ fide occupation—Sub-letting.

Where sub-tenants were in occupation of a considerable part of the holding previous to the letting to the predecessor of the present tenant, and had rents fixed on the passing of the Act of 1881, and never surrendered.

Held, that the tenant was not in occupation of the holding.

The area was 255 acres, 39 perches; the rent was £150. The remaining facts appear in the Judgment.

GREER, A.L.C.—This case was heard at considerable length at Sligo. The facts are admitted. The tenant's predecessor acquired the holding from the predecessor of the landlord many years ago; and at the time of the creation of the tenancy there were sub-tenants upon the holding, who held some 40 acres of the lands amongst them. These tenancies were never surrendered, and the sub-tenants, after the passing of the Land Law (Ireland) Act, 1881, had judicial rents fixed as against the present tenant. Under these circumstances the tenant is not, and never was, in occupation of the holding within the meaning of the Land Law (Ireland) Act, 1881. Mr. M'Carthy, with considerable force, contended for the tenant that, the sub-lettings having been in existence for so many years, the legal presumption was that the landlord had consented; whilst Mr. Fenton argued *contra* that the question of sub-letting was not involved in the case, the sub-tenants being in the actual

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occupation of the lands prior to the letting to the predecessor of the present tenant, and that, in my opinion, is the correct view of the law as it exists. The leading authorities upon the subject, which are conclusive, are *Flannery v. Nolan* (*ante*, p. 239) (20 L.R.I., 540), and *Buchanan v. Cowell* (*ante*, p. 217) (26 I.L.T.R., 24). This Court is bound to give effect to those decisions, and the application is, therefore, dismissed.—I.L.T.R., vol. xxix., 131.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
Feb. 1, 2, 8,
1882.

(Before LAW, C., SULLIVAN, M.R., DEASY and
FITZGIBBON, L.JJ.)

Elffe v. M'Kennas.

Land Law (Ireland) Act, 1881, s. 58 (7)—Letting for "temporary convenience"—"Yearly tenancy"—Setting aside originating notice to fix fair rent—Appeal, right of.

Within a couple of months after the expiration of the last of a series of leases, and while the tenant continued to overhold, the landlord stated that he required the land for building purposes; but the tenant having urged that if possession were resumed he would be a heavy loser, as he had highly manured the land, the landlord replied that he might keep the land until he had exhausted the manure. The amount of the rent to be payable was not fixed, the landlord requiring more, and the tenant less, than the amount payable under the lease. The tenant, with the landlord's consent, continued in possession thus for three years, and from time to time, after two years, paid various

sums as and towards rent, but still without any settlement of what should be the amount. On appeal from an order of the Land Commission, refusing to set aside an originating notice to fix a fair rent for the holding :

Held, that whether a yearly tenancy had been created or not, the letting was for the "temporary convenience" of the landlord or tenant within the meaning of section 58 (7) of the Land Law Act, 1881 (44 & 45 Vict., c. 49).

Per FITZGIBBON, L.J.—The temporary convenience or temporary necessity which excludes a tenant's claim may be existing "for a time" compatible not only with a tenancy at will, or a tenancy less than a tenancy from year to year, under section 69 of the Landlord and Tenant Act, 1870, but also under that Act and the Land Law Act, 1881, subject to the restriction as to written evidence, with a tenancy from year to year for life or lives. Though circumstances were here shown which, if unexplained or unqualified by the other facts, might afford presumptive evidence of a tenancy from year to year, they had been so explained and qualified, and there was no sufficient evidence to sustain the finding of the Court below that a tenancy from year to year existed in the holding; nor was the Court debarred, under the circumstances, from reversing the decision of the Land Commission, as, being upon a question of fact, the question largely depended on legal considerations. *Montgomery v. Montgomery* (14 I.L.T.R., 9) applied.

LAW, C.—This is an appeal, brought by Mr. Eiffe, landlord, with the permission of the Court of Land Commissioners, under the Land Law (Ireland) Act, section 48, sub-section 2, from an order made by that Court on the 3rd December last, refusing, with costs, his application to set aside an originating notice served on him by the defendants as executors of Charles Kavanagh, and seeking to have a fair rent fixed for certain lands in their possession as such executors, called the "Windmill Field," situate in the Electoral Division of Rathmines,

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in the South Dublin Union. The field contains 5 acres, 1 rood, 4 perches, and was lately held by Mr. Charles Kavanagh, from Mr. Eiffe, under a lease for thirty-one years, from the 7th May, 1847, at the rent of £30. The lease expired in 1878, and within a couple of months after the determination of the lease—viz., on the 2nd July, 1878—Mr. Eiffe wrote to Mr. Charles Kavanagh a letter in which this passage occurs: "When do you propose coming to some arrangement as to the land out of lease, and what rent do you say for this half-year? I shall expect £10 the Irish acre at the least for this half-year ending 7th November, 1878. If you do not wish to pay that, please at once deliver up possession, and we can settle what is fair for the rent up to this date. If you deliver up possession, the fences must be put up, which appear to have been completely destroyed." No written reply appears to have been made to this letter; but Mr. Kavanagh seems to have called personally on Mr. Eiffe to discuss the subject of the letter, and what then occurred is narrated in the 4th paragraph of the affidavit made by Mr. Eiffe, the accuracy of which is not attempted to be disputed. That paragraph is as follows: "In July, 1878, the said Charles Kavanagh called upon me with reference to the said portion of land out of lease. At such interview, the said Charles Kavanagh said that he thought I would renew his lease. I told him that I purposed taking possession of the said portion of the land with a view of establishing a brick manufactory thereon, for the purpose of working the brick clay thereunder, and building thereon or letting it for building. The said Charles Kavanagh then said—'I have highly manured the land, and if you take possession I shall be a heavy loser.' I replied that I would not wish on any account that he should lose the benefit of the manure, and said he might keep the land until he had exhausted the manure. I added that, in addition, I had not yet made arrange-

ments as to starting the brick manufactory and the building scheme. The said Charles Kavanagh thanked me very much for leaving him in possession of the land upon the aforesaid terms. I told him I should expect him to pay for such time as he might have the land at the rate of £10 per Irish acre, and that he could re-erect the fences which had been thrown down. He agreed to the latter, but said that £10 an acre was too much ; that he could not pay more than £8. We parted without coming to any arrangement as to the amount."

As Kavanagh did not give up possession, but, on the contrary, was allowed to retain it, we must assume that this was on the terms thus stated by Mr. Eiffe, there being no evidence of any other arrangement at the time. The amount of rent, however, to be paid by Kavanagh would appear to have remained unsettled during his lifetime. He paid £80 on the 28th September, 1880, and took a receipt expressed to be on account of back rent of the Mill field, lately out of lease, and afterwards, on the 20th November, paid a further sum of £20, getting a receipt, which stated in terms that there still was no settlement as to what should be the rent. He died on the 10th June, 1881, leaving matters in that position. On the 30th July Mr. Eiffe wrote to the respondents, who were Kavanagh's executors, asking for the rent of the three other holdings, and adding : " There is a fourth holding which I must bring particularly under your notice. It was leased to the late Mr. Charles Kavanagh. The lease expired in May, 1878, since which no arrangement was made for a re-letting. I had some idea of working the brick clay thereon, and also that portion of it might be taken for a railway. I told Mr. Charles Kavanagh that as long as he kept it he should pay £10 per acre (Irish) for it. He paid me two sums on account of it, one of £80, and another of £25. There, therefore, remains due for the use and occupation of this holding, up to the 25th of

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March last, the sum of £45. I must distinctly decline being in any way mixed up with any sale that may be made of the remainder of the premises. I may be disposed to let the land to a solvent tenant for £50 per annum, subject to certain restrictions. In the event of necessity I beg to inform the representatives of Mr. Charles Kavanagh that I shall require them to put up all the fences levelled by him or his predecessors."

Again, on the 10th October, Mr. Eiffe wrote to the executors saying—"The executors must also come to some arrangement as to the portion out of lease, as I must know whether they will hold it on the terms I mentioned." In consequence of this letter, the respondents and their solicitor had an interview with Mr. Eiffe on the 17th October last, and paid him £40 10s., which, with £4 10s. allowed as an abatement, amounted to £45, and for this sum of £45 Mr. Eiffe gave them a receipt in full for all demands for use and occupation up to 25th March, 1881. On that occasion they also applied to Mr. Eiffe to recognise them as his tenants from year to year of this Windmill Field, so that they might sell it as part of their testator's effects. This, he says, he declined to do, and that without further communication they served him with the originating notice to have a fair rent fixed under section 8 of the Land Law Act. Mr. Eiffe further deposes in paragraph 7 of his affidavit—"The applicants, as executors of the said Charles Kavanagh, occupy the said portion of land merely on my sufferance, pending my making arrangements for brickmaking, or letting for building, and on the distinct agreement that at any moment I might take up possession of the same. The occupation was for the temporary convenience of myself and the said Charles Kavanagh, that pending such arrangement the land might not lie idle."

Under these circumstances, Mr. Eiffe insists here, as he did before the Land Commission, in the first place,

that the respondents are not his yearly tenants at all, and, therefore, not entitled to apply under the Land Law Act to fix a fair rent ; and, secondly, that even if they were his yearly tenants, their holding is excluded from the Act by section 58, sub-section 7, as being one "for the temporary convenience or to meet a temporary necessity of either landlord or tenant." Both of these grounds of objection were, of course, disputed by the respondents ; but, in the view I take of the case, it is unnecessary to express any opinion upon the first point in controversy ; and, as it may possibly come before a jury for decision, I think it is better to leave it for that tribunal, unprejudiced by any observations of mine.

As to the second point, I believe we are all agreed that, whatever the tenancy may be, the holding is one for temporary convenience within the meaning of the clauses referred to, and, as such, excluded from the operation of the Act. It appears by the originating notice that the field is in the electoral division of Rathmines ; and, taking the terms of the letting from Mr. Eiffe's affidavit, where alone we find any evidence of them, I feel satisfied that the land was let to Kavanagh as a matter of temporary convenience, so that Mr. Eiffe, when the necessary arrangements and preparations of which he told Kavanagh should be sufficiently advanced, might be able to recover possession without inconvenient delay ; and that, in the meantime, the land might not remain idle and unproductive of income. In fact, it appears to me that this is precisely the sort of case for which the exemption in question is most needed, and to which it most properly applies. If land which is likely soon to become building ground, or, what is the same thing, which the owner contemplates dealing with as building ground, is not to be saved from the operation of the Land Law Act, very great injustice would be done. The fixing a fair rent under the Act would frustrate all such building designs on the part of

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the landlord, giving absolute fixity of tenure to the tenant for the first fifteen years, and, after that, only enabling the landlord, if the Court allowed him, to purchase out the tenant at the full value of his interest. Then, taking the arrangement between Mr. Eiffe and Charles Kavanagh, as described in Mr. Eiffe's affidavit, I have no doubt that it was of the temporary character indicated by the exemption clause referred to. Nor can I find anything in the two letters which Mr. Eiffe subsequently wrote at all inconsistent with such temporary arrangement. On the contrary, they seem to me, rightly or wrongly, to treat even the arrangement, whatever it was to be, as still incomplete, and, therefore, it is impossible to regard them as showing that the occupation was not treated by Mr. Eiffe, at least, as still of the temporary character mentioned at his personal interview with Kavanagh, in July, 1878.

As to the receipts, they also are valueless for any purpose of this kind. Even assuming the occupation to have been that of a yearly tenant, he was, of course, bound as such to pay rent, and, therefore, this cannot affect the present question. On the whole, therefore, I am of opinion that this holding was one for the temporary convenience of Mr. Eiffe, and, indeed, Kavanagh also; that Mr. Eiffe's application to set aside the originating notice should have been acceded to, and must now be granted; and that, therefore, the order appealed from should be reversed with costs.

Sullivan, M.R., Deasy and FitzGibbon, L.JJ., concurred.—I.L.T.R., xvi., 39.

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Appeal.
January 28, 31,
1887.

(Before SIR MICHAEL MORRIS, C.J., FITZGIBBON and
BARRY, L.JJ.)

Croker v. Clanchy.

Agricultural lease by predecessor in title of infant—Expiry of, while reversioner a ward of Court, and before passing of Land Law (Ireland) Act, 1881—Receiver in minor matter continuing to accept same rent without a fresh letting—Originating notice by tenant to fix “fair rent,” while minor matter still pending—Contract for tenancy (section 57)—Letting for “temporary convenience” (section 58).

On the expiration of a twenty-one years' agricultural lease, in May, 1879, the owner of the reversion was an infant, and had been for about twelve years a ward of Court. The receiver in the minor matter continued to accept from C., the lessee, the same rent after the termination of the lease, and in February, 1881, brought the fact of such termination before the Receiver Judge on an ordinary “statement of facts,” upon which a ruling was made, giving the receiver liberty to take a new proposal, in the proper form, from C., and to bring the same before the Court for consideration. The receiver, however, merely continued, as before, to accept the old rent, and bring it into his annual account. In November, 1881, C., having served an originating notice to have a “fair rent” fixed, under the Land Law (Ireland) Act, 1881 :—

Held, by the Court of Appeal, upon a “case stated” for its opinion by the Land Commission, that C. was not the tenant of a “present tenancy” within section 8 of the Act.—L.R.I., xx., 111.

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SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before PALLES, C.B., FITGIBBON and BARRY, L.JJ.)

Whisker v. Delacherois.

The Sub-Commission (Greer, A.L.C.) fixed a fair rent. The Land Commission affirmed. The Court of Appeal reversed with costs.

Eiffe v. McKenna (ante, p. 408), Chaine v. Croker, and Butterly v. Carroll, referred to.

Letting for temporary convenience—Power to resume portion for building purposes.

Anne Delacherois, tenant for life by lease, dated 2nd February, 1877, demised the lands of Ballywilliam, near Bangor, in the County of Down, containing 149 acres, to Samuel Delacherois, for her own life, at the yearly rent of £330, subject to the following covenant: "And it is hereby agreed that the said Anne Delacherois, her executors, administrators, and assigns, shall be at liberty at any time during the continuance of this demise to take up on demand, without any previous notice, any portion of the lands hereby demised, coloured green on the map hereunto annexed, which may be about to be let for building purposes, and that thereupon the rent hereby reserved shall be reduced at the rate of £2 per statute acre so taken up, and so in proportion for roods and perches."

By lease dated 28th December, 1880, Samuel Delacherois sub-demised the lands to James Whisker for the term of thirty-one years. In this case the reserved rent was also £330, and the covenant for resumption contained in the superior lease was repeated. On the 18th of October, 1887, Whisker served an originating notice

to have a fair rent fixed. The Sub-Commission fixed the fair rent at £225. Upon appeal the Land Commission confirmed the order of the Sub-Commission.

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The Judgment of the Court of Appeal was subsequently delivered by Palles, C.B., who held that the decision of the Land Commission must be reversed and the originating notice dismissed with costs. The case was ruled by *Eiffe v. M'Kenna* (*ante*), *Chaine v. Croker*, and *Butterly v. Carroll*, in which it was established that where a power to resume any portion of the land for building purposes, etc., was reserved, the letting was for temporary convenience, and a fair rent could not be fixed.—I.L.T.R., xxv., 34.

SUPREME COURT OF JUDICATURE.

Appeal.
February 9,
1891.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., and FITZGIBBON and
BARRY, L.JJ.)

Mooney v. Willcocks.

Butterly v. Carroll, and *Leonard v. St. Leger Barry*,
distinguished.

*Landlord and tenant—Letting for agricultural purposes—
Power to resume portion of the holding for building
purposes, Land Act, 1881, Land Act, 1887, section 1.*

*Sub-Commission (Kane, Q.C., A.L.C.) fixed a fair rent.
Land Commission reversed.*

*Held (reversing the decision of the Land Commission),
that the tenant was entitled to have a fair rent fixed.*

LORD ASHBOURNE, C.—This is an appeal from an order of the Land Commission dismissing the tenant's application to fix a fair rent, and setting aside the order

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of the Sub-Commission fixing such fair rent. The holding in this case comprises 65 acres and 30 perches, in the County of Dublin, held under a lease of the 16th April, 1875, from John Willcocks to the present tenant for thirty-one years, at £201 annual rent. The Poor-law valuation is £123. The tenant having duly initiated proceedings, the Sub-Commission fixed the fair rent of the holding at the annual sum of £145. The landlord appealed and urged that the tenant had no right to have a fair rent fixed, because part of his holding was let for temporary convenience, and, therefore, it was all excluded. The Land Commission heard the appeal, and the late Mr. Justice Litton delivered Judgment, allowing the appeal. The soundness of that Judgment has been challenged before us; and as the case is of some importance, we have carefully considered the arguments addressed to us, and the various authorities bearing on the subject.

The lease of the 16th April, 1875, contains the following provisions :—" The said John Mooney, for himself, his executors, administrators, and lawful assigns, agrees to surrender and yield up to the said John Willcocks, his heirs or assigns, *any part* of the hereby demised premises required to be let for building purposes, provided that such part or parts shall not, during the said term, exceed altogether 5 statute acres of the said lands, the said John Mooney, his executors, administrators, and lawful assigns, being allowed a reduction in the rent reserved at the rate of £3 5s. per statute acre, for each acre taken up, and so in proportion for any fractional part of an acre." The whole argument of the landlord turns upon that clause. He has contended that the lessee was not entitled to fix a fair rent, on the ground that portion of the holding under the foregoing clause was let for a temporary purpose, and that part of the holding was thereby excluded from the Act, and as any fair rent fixed must be fixed on the entire holding,

the whole was excluded by reason of the part being excluded.

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What is the construction of the proviso of the lease relied on? The tenant covenants that he will surrender to the landlord any part of this holding, not exceeding 5 statute acres, that may be required for building. No definite part of the holding is indicated. The 5 acres might be found in "any part of the holding," or in different parts of the holding. It is said that this makes a letting of the undefined 5 statute acres for temporary convenience. It may be noted that the lease was made on the 16th of April, 1875, and that half its term has been allowed to go by without any effort on the part of the landlord to avail himself of this temporary convenience. If the argument of the landlord is sound now, it would be as sound the year before the expiration of the lease. It is also difficult to say that the argument could not be pressed with equal logical force, if the covenant to surrender was for much less than 5 acres, even though it had never been acted on.

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The Land Commission conceived it was bound by authority, and that in yielding to the landlord's contention it was merely giving effect to decisions already arrived at. What are the decisions, and do they bear out this view? Mr. Justice Litton relied, in the first instance, on the case of *Leonard v. St Leger Barry* (1). The holding there contained 50 acres, of which 21 were demesne lands. Mr. Justice O'Hagan, in giving judgment, said: "Demesne lands are excluded from the Act, shut out from the operation of the Court altogether; and, therefore, if demesne lands are incorporated with other lands which are not demesne lands, inasmuch as we are precluded from any judicial action as regards a portion of the holding, we are of opinion that we are precluded from action altogether, otherwise our general action would lead to illegal action. We might not take that course if the demesne portion were very small; but

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having here 21 acres unquestionably old demesne lands, and remaining such in its character, we are of opinion that we are shut out from dealing with the holding altogether. I entirely concur in that decision, which dealt with the holding, over one-third of which was known and earmarked as demesne lands, and outside the Act. Then came the case of *Butterly v. Carroll* (2), decided in this Court; and it seems to me that the Land Commission Court arrived at this decision mainly upon their interpretation of that authority. There the tenant was tenant under a lease dated the 26th March, 1877, of a holding containing about 8 acres, 2 roods, 31 perches for thirty-one years. The following proviso was in the lease:—"It shall be lawful for the said lessors, their executors, administrators, and assigns, to take off, for building purposes, portion of the lands and premises adjoining the south side of said new road upon giving three months' notice in writing, such portion to be taken off to extend to the entire frontage of said hereby demised premises, on the said south side of said road, or any part thereof, but not to exceed in depth from the said road 200 feet." The rent was to be reduced at the rate of £10 for each acre taken up. The portion of holding effected by the above proviso consisted of about 4 acres. There the portion was defined with precision, and its extent was about half the holding. Under these circumstances the Court of Appeal (composed on that occasion of Lord Chief Justice Morris and Lords Justices FitzGibbon and Barry) arrived at the clear conclusion that, having regard to *Chaine v. Croker* (1), *Eiffe v. M'Kenna* (2), and *Leonard v. St. Leger Barry* (3), their decision should be in favour of the landlord. In the case of *Chaine v. Croker* (1) the provision for temporary convenience applied to the entire holding; and the same remark may be made in the case of *Eiffe v. M'Kenna* (2). The case of *Whisker v. Delacherois* (*ante*, p. 416) (4), in the Registrar's book,

supports *Butterly v. Carroll* (5). There the part that was to be taken up for building was marked and coloured on the map. The result of these cases appears to be that, when the entire holding can be shown to have been let for temporary convenience, it is excluded from the Act; and the same will follow if a substantial part of the holding is shown to consist of demesne lands, or if a defined substantial part is shown to have been let for temporary convenience. In the present case none of these constituents exist. The tenant holds a large agricultural farm at a substantial rent, and subject to a covenant that he shall surrender a small undefined part of it, if and when it may be required for building. I do not think that the authorities relied on in the Court below can be stretched to support its decision, and, therefore, I think the Appeal should be allowed with costs.

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FITZGIBBON, L.J.—I concur with the Lord Chancellor in this case, which, from every point of view, is a case of importance. The holding is of considerable extent; it is an agricultural holding, pure and simple; the lease contains special covenants for good husbandry, tilling, manuring, &c.; the term is that of an ordinary farming take; therefore the question is, whether the existence in an agricultural lease of a condition enabling the landlord to take up a small undefined portion of the land for building, on fixed terms, excludes the entire holding from the Land Acts.

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L.J.

It is to be observed that the Land Law Act of 1881, section 5, sub-section 6, attaches a very similar condition to every statutory tenancy; and if this clause excludes the holding, it will have that effect, though it merely aimed, by anticipation, at giving to the landlord a limited power of resumption like that which the Land Act itself confers. In my opinion, this clause of resumption leaves the land, even the five acres, in the tenant's possession as part of an agricultural holding,

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unless and until it is required for building, which may never be. If the matter were devoid of authority, I should hold without hesitation that such a clause does not *per se* exclude the holding from the Act, and can only do so if, with the other circumstances of the case, it affords sufficient evidence that the letting is one for a temporary purpose.

But is this case within the previous decisions? All these have purported to rest on the principle of *Leonard v. St. Leger Barry* (1). That was a case of demesne land. Mr. Healy has now pointed out for the first time that the excepting words of the Act as to "demesne lands," and as to a "holding" let for a temporary purpose, are different; and he contends that the *entire* holding must be so let, or the exception will not operate. I do not accept this distinction; and even if it be well founded, we cannot act on it without disregarding our own decisions in *Butterly v. Carroll* (2), and *Whisker v. Delacherois* (3). But I think there is one clear and intelligible principle which rules all the cases—whether "demesne land" or "town-parks," or land let for a temporary purpose, if any land be included in the holding over which the Land Commission has no jurisdiction, part of the holding being excluded. I think, as I said in *Butterly v. Carroll* (2), that it is "arithmetically and legally impossible to fix a fair rent upon the entire holding where part of it is excepted, or to fix a fair rent upon an undeterminate part of it." The Judgment of Morris, C.J., in *Butterly v. Carroll* (1), is grounded on this principle, viz., that if any part of the holding is let for temporary convenience, that part is as much outside the jurisdiction of the Land Commission as was the demesne land in *Leonard v. St. Leger Barry* (2), and that circumstance, "*ipso facto*, deprived the Land Commission Court of jurisdiction over the holding altogether," where a bulk rent was reserved; and if they attempted to divide the rent, they would be doing what

they had no right to do. But does that principle apply here? I think not. Here the landlord may or may not take up any small part of the holding for a certain purpose. But until he does so every part of the holding is agricultural land, apparently within the Act. Even if a fair rent were fixed, the landlord could resume all or any part of the holding on fair terms, for building purposes. Therefore, the existence of such a power is not repugnant to the jurisdiction of the Land Commission. In *Butterly v. Carroll* (1) there were only 8½ acres in the entire holding, which was at Drumcondra, in the suburbs of Dublin, and fronted a new road actually laid out for building. The power to resume a defined and measured part of the holding—or nearly half of it—for the purpose of building villas on it, was, with the other circumstances, conclusive proof, as to half the holding, that it was let for a temporary purpose, came directly within *Eiffé's case* (*ante*, p. 408) (3), and was outside the jurisdiction of the Land Commission. *Whisker v. Delacherois* (4) was even a stronger case. The holding was a very large one, close to the town of Bangor, a growing seaside resort; it faced the sea, and contained 149 statute acres, let at a bulk rent. The lease contained a provision that the landlord might at any moment take up all or any portion of the lands coloured green on the map attached to the lease, making compensation to the tenant for any growing crops, and reducing the rent at the rate of £2 an acre. It appeared from the map that this condition affected about half the holding, and, therefore, as in *Butterly's case* (1), it plainly appeared that a substantial part of the holding was let for a temporary purpose only; therefore, a fair rent could not be fixed arithmetically or legally on the whole.

There was another case, *Nagle v. Galbraith* (*ante*, p. 217) (1), in which I differed from my colleagues, where they saw their way to hold that there had been a

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"shrinkage" of the original letting, and that after the tenant had re-let part of the premises back to the landlord, the remainder was to be regarded as an entire holding of which he was *bond fide* in occupation. But that case affirmed the principle that the *entire holding* must be within the Act. Even in a case like this, the provision for resumption is not unimportant; but its effect is not to show conclusively that part of the holding is outside the Act, but to raise the question whether all or part has been let for temporary convenience; it is evidence of the nature or purpose of the letting, but it is no more. If associated with other circumstances, it might show that the letting was one for temporary convenience; if affecting a specified portion of the holding, it might exclude that portion from the Act; but this being an agricultural holding, and no part of it being excluded, this covenant is not sufficient to take the case out of the Act, and we must, therefore, overrule the decision of the Land Commission, and refer the case back to fix a fair rent, as it is conceded that there is no other point against the tenant's application than that arising on the covenant.

Barry, L.J., concurred.—L.R.I., xxviii., 113.

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SUB-COMMISSION.

(Before GREER, A.L.C.)

Baily v. Dobbs.

Land Law (Ireland) Act, 1881—Temporary convenience
—Area, 97 acres, 3 roods, 36 perches; rent, £169
11s. 10d.

GREER, A.L.C.—This holding was held under an agreement for a lease, dated 31st August, 1848, for forty-one years from the 1st November, 1848, and the

term of which expired at 1st November, 1889. It contained a covenant entitling the lessor to build one or more mansion-houses, villas, or country seats upon the lands on paying to the lessee full value for the unexpired interest under the lease as therein provided for. The originating notice is dated March, 1888, and the application is founded on the agreement of August, 1848, which was then subsisting. Since the determination of the agreement in November, 1889, the landlord has been receiving rent from the tenant under an ordinary contract of tenancy from year to year. Mr. O'Rorke asked me to dismiss the application on the ground that the agreement bore on the face of it evidence that the letting was for the temporary convenience of the parties. Mr. Young, on the other hand, contended that the agreement having determined, a new tenancy was created from November, 1889, discharged of all the conditions contained in that instrument. As I have said, the tenant's originating notice is dated March, 1888, and he was then holding under the agreement; and had the Court been then called upon to deal with the application, I should probably have dismissed it, but I am now bound to look to the action of the parties since the agreement expired. The application to this Court was then pending. The landlord had full notice that the tenant had applied to the Court to have a fair rent fixed upon the holding, and it was open to him on the expiration of the agreement to have proceeded for recovery of possession of the lands. He did not do so but constituted the tenant a yearly tenant of the holding, without any stipulation whatever as to his continuing to hold under the covenants in the agreement, or for the temporary convenience either of himself or the tenant. I must, therefore, assume from the acts of the parties themselves that in November, 1889, the question of temporary convenience was not present to the mind of either landlord or tenant, and especially so

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Baily
v.
Dobbs.

as the Act of 1881 had then been passed, and the law upon this subject was well known and established in Ulster. The tenant is, in my opinion, the present tenant of an ordinary agricultural holding, discharged of all conditions as to temporary convenience that might have attached to it under the agreement. As such he is entitled to have a fair rent fixed.

[Not reported.]

This decision was subsequently affirmed on Appeal.

[Not reported.]

SUB-COMMISSION.

Sub-Com.
June,
1893.

(Before GREER, A.L.C.)

M'Auley v. Brown.

Land Law (Ireland) Act, 1881—Temporary convenience.

GREER, A.L.C.—This holding contains 32 acres, and is held at a rent of £40 ; it is situated in the immediate vicinity of the city of Derry. It was held under a lease for five years, which expired in November, 1870. In November, 1888, the present tenant purchased the holding, together with another holding containing 10 acres, 2 roods, 16 perches, for a sum of £625. The lease contained a covenant entitling the landlord to resume possession of the holding, or any part of it, during the term, for building purposes, and it was contended by Mr. M'Kay that that condition was an incident of the tenancy, and attached to the holding after the expiration of the lease, and he asked me under the circumstances to hold that the letting was one for temporary convenience. Mr. M'Kay referred me to several well-known authorities, all of which apply to specific

contracts, which were in existence at the time of the application to the Court, and which were in writing. But I have not been able to discover any decision the facts of which were analogous to the present one. Here we have a lease for five years only, which expired after the passing of the Landlord and Tenant (Ireland) Act, 1870, and from which an ordinary tenancy from year to year is created without reference whatever, either by landlord or tenant, to the previous conditions of the tenancy; and it does appear remarkable that, with the knowledge of the provisions of the Act of 1870 regarding lettings made for the temporary convenience of the parties, no new contract was made defining the term of the tenancy in that respect. Again, in November, 1883, when attention must have been attracted to the decisions of the Land Courts upon this question of temporary convenience, the landlord in this case permits a sale of the holding, and allows the tenant to dispose of his interest in it for a very large sum, and subsequently for a period of four years accepts the rent from the purchaser, without intimating to him that he had purchased the land subject to such a condition. I feel bound to hold that the tenure of the present tenant is not subject to the condition of the original letting so far as temporary convenience is concerned; and he is, therefore, entitled to have a fair rent fixed.

Subsequently, in May, 1894, Mr. Justice Bewley decided that the object of the letting was not for temporary convenience, and on appeal he affirmed the decision of the Sub-Commission.

From Mr. Justice Bewley's decision an appeal was taken by the landlord to the Supreme Court, when the Lord Chancellor delivered the Judgment of the Court, stating that whatever was the object of the first letting, that in the new tenancy that had sprung up there was no such condition as that the holding should be held for temporary convenience; and relying strongly

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on the circumstance that no mention had been made of such at the time of the purchase from the Crommelins, the appeal should be dismissed with costs.

M^r Auley
v.
Brown.

The Lords Justices concurred.
[Not reported.]

LAND COMMISSION.

Land Com.
January 14,
1896.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Thompson v. Cleland.

Landlord and Tenant—Tenancy from year to year—Subsequent agreement before 1881 that landlord might take up premises for building purposes—Letting for temporary convenience—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), s. 58 (7).

In considering whether a holding was let for the temporary convenience or to meet a temporary necessity either of the landlord or tenant within section 58, sub-section 7, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), regard must be had to what were the subsisting terms of the letting at the passing of the Act.

In January, 1871, the landlord of agricultural lands, held from him under a tenancy from year to year, and situate in a locality in which a demand had sprung up for sites for residences, made an agreement with the tenant by which the landlord was to be at liberty at any time, and without any formal notice, to take up possession of the lands, and to grant leases thereof for building or for any purpose whatsoever, except farming leases, the landlord making a reduction in the rent and

a payment for taking possession. On an application by the tenant to have a fair rent fixed :—

Land Com.
January 14,
1896.

Held, that regard should be had not only to the original terms of the contract of letting, but to the special terms introduced by the subsequent agreement ; and, the Court being of opinion, under the circumstances, that at the time the Act of 1881 came into operation, the holding was let for the temporary convenience of the landlord :—

Thompson
v.
Cleland.

Held, that the originating notice should be dismissed.
—I.R., 1896, 190.

SUB-COMMISSION.

Sub-Com.
March 5,
1896.

(Before BAILEY, A.L.C.)

Hood v. Abercorn.

Letting for temporary convenience—Fair rent—Land Law (Ireland) Act, 1881, s. 58.

In considering whether land is let for temporary convenience, regard must be had not alone to the purpose present to the mind of the person making the letting, but also to the view that would naturally be taken of that purpose by the person to whom the letting was made.

Held, a letting of land in exchange for other land intended to be used for the planting of trees, so as to beautify the approach to a demesne, is not a letting for temporary convenience.—I.L.T.R., vol. xxx., 100.

Land Com.
December 18,
1896.

LAND COMMISSION.

(Before BEWLEY, J., FITZGERALD, Q.C., and LYNCH,
Commissioners.)

M'Ginley v. The Education Board of the Cavan Presbytery.

*Land Law (Ireland) Act, 1881—Home Farm—Temporary
Convenience.*

The tenant, Thomas M'Ginley, bought the holding in 1879 from the Rev. Mr. Strong, Presbyterian Minister of Killeshandra, for £30. The farm contains 45 acres, 1 rood, 38 perches, and the rent was £47 10s. The County Court Judge (Waters, Q.C.) fixed a fair rent of £31 10s., and the landlord appealed, on the ground that the letting was for temporary convenience, and that this was a grazing letting. In 1770 these lands were vested in trustees "for the use, benefit, and behoof of the Protestant dissenters of the congregation of Croghan, County Cavan;" and in the scheme drawn up in 1894 under the Educational Endowments Act, which vested the property of the Presbytery in an Education Board, the farm was scheduled as part of the property. It was contended that the farm was the property of the congregation, that the Rev. Mr. Strong had no power to part with it, and that it was now wanted as the site for a manse. The Rev. John Whitsitt, the minister at Croghan, deposed that Mr. M'Ginley had promised to give up possession whenever the congregation required the land. He said he recognised it was Church property. Mr. Faris, one of the trustees, witness, and M'Ginley met in the Petty Sessions Court at Killeshandra, a document was drawn up, and M'Ginley was about to sign it, agreeing to give up possession, when

"one Davis came in drunk, wanted to know what all this was about, that the place was theirs, and they did not require to bind any man to leave it when required, and that they would simply put him out when they liked." M'Ginley threw down the pen, and said, "When you are agreed among yourselves, I will sign it," and he walked out of the room. A writ of ejectment had been served on M'Ginley, and he had responded with this originating notice. Rev. W. M'Donnell and Mr. Faris deposed to hearing M'Ginley say he would give up the land when required. Evidence was given as to the user of the holding.

Land Com.
December 18,
1896.

*M'Ginley
v.
The
Education
Board of the
Cavan
Presbytery.*

BEWLEY, J.—In this case the landlords objected to the fixing of a fair rent by the tenant on several grounds. Amongst others it was alleged that the holding was a home farm. It was also alleged it had been let mainly for the purpose of pasture, and it was further argued that the letting was one for temporary convenience. The Court were of opinion that the letting made to M'Ginley was a letting which embodied, as one of its conditions, a condition that this tenant should give up the lands whenever required, and that such a letting was necessarily a letting for temporary convenience or to meet the temporary requirements of the landlords. The order of the County Court Judge fixing a fair rent ought to be discharged, and the originating notice dismissed.

Exch. Ch.
April 27,
June 22,
1874.

EXCHEQUER CHAMBER.

(Case stated.)

(Before WHITESIDE, C.J., PALLES, C.B., O'BRIEN and
FITZGERALD, JJ., FITZGERALD, DEASY, and
DOWSE, BB.)

Wright v. Tracey.*Landlord and Tenant (Ireland) Act, 1870, section 69—**A letting of the grass with the use of the houses, as a temporary convenience to such letting, for one year certain.*

Held, not to be a tenancy requiring notice to quit under section 69, and that Judgment should be entered for the plaintiff.

The plaintiff, by an agreement, dated 8th March, 1871, and signed by the parties, set to the defendant "the grass of part of the lands of Ballynagran, with the use of the dwelling-house and out-offices, and all appurtenances thereunto belonging, as a temporary convenience to such letting, all which premises are now in the possession or occupation of the said Morgan Tracey; and it is hereby agreed between the said parties that this letting is and is to be solely as a pasture farm, and for a dairy and dairy accommodation, and for the term of one year certain, to commence on the 25th day of March next, 1871, and to end on the 25th day of March, 1872. . . . The said Morgan Tracey is to have for tillage the Minister's Hill, free of rent, as a convenience during the said period of tenancy." Possession was given to the defendant under that agreement in December, 1871. Action of ejectment was brought at the last Wicklow Assizes, claiming possession as from 26th March, 1872. Defendant relied on the fact that under

section 69 of the Land Act, the defendant was entitled to a notice to quit. Fitzgerald, J., directed a verdict for the plaintiff, but reserved liberty to the defendant to move to have a non-suit entered, if the Court should be of opinion that the plaintiff ought to be non-suited.—The Court of Common Pleas (Monahan, C.J., Lawson and Morris, JJ.—Monahan diss.) subsequently upheld the verdict had for the plaintiff.

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April 27,
June 22,
1874.

Wright
v.
Tracey.

DOWSE, B.—Lord Coke (Heydon's case, 3 Rep., 7 b) says that in interpreting a statute we should consider "first, what was the common law before the making of the Act; second, what was the mischief and defect for which the common law did not provide; third, what remedy Parliament had resolved and appointed to cure the disease of the commonwealth; fourth, what was the true reason of the remedy." These are the words of a lawyer and a statesman—no mere pedant. Applying the rule—before this statute a tenancy for a year certain did not require a notice to quit to determine it; the mischief and defect of the common law was the creation of tenancies for a year certain, to be renewed from year to year, leaving the tenant uncertain whether the estate he held in the land was to be a continuing estate or not, and thus not only injuring the individual, but injuriously affecting through him the community of which he was a member; the remedy resolved and appointed by Parliament is that no person shall be at liberty to defeat the benefits that the statute annexes to tenancies from year to year properly so called, by turning them into tenancies ending with each year certain, and with the hope of beginning again for another year certain, to end in the same way; and so on from year to year. The case is within the mischief and defect that Parliament intended to provide against. But is it within the words of the statute? Is a tenancy for a year certain less than a tenancy from year to year? I think it is.

Dowse, B.

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Dowse, B.

Both tenancies must last for at least the same length of time, and the tenancy from year to year must last a year longer than the others, if the landlord does not serve a notice to quit half a year after the day the tenancy began. In *Gandy v. Jubber* (9 B. & S., 18) the Court held that "a tenancy from year to year was a lease for two years certain [*sic*], and that every year after it is a springing interest arising from the first contract and parcel of it; so that if the lessee occupies for a number of years, these years, by computation from the time past, make an entire lease for so many years, and that after the commencement of each new year it becomes an entire lease certain for the year past and also for the year so entered upon." The Court seem to think that an ordinary tenancy from year to year lasts for two years. That is a mistake; but it in no way detracts from the Judgment or reasoning on which it is founded. The words in the statute, "on quitting his holding," mean *on being required* to quit his holding. The words of the Act are not doubtful, and, therefore, in my opinion, notice to quit should have been served in this case.

Deasy, B.

DEASY, B.—Held that the tenancy for a year certain was less than a tenancy from year to year, and that under the 69th section the tenant was entitled to notice to quit. "If a tenant from year to year demises for a term of years, and the original tenancy from year to year lasts beyond that term, such a demise is not an *assignment*, but there is a reversion, on which covenant can be maintained." (*Oxley v. James*, 13 M. & W., 214.) The Land Act is framed in loose and popular phraseology, and deals with a subject of popular interest; and no one but a lawyer would have any doubt that a tenancy from year to year, which may last for an indefinite number of years, is a greater tenancy than one limited to a year, and which must terminate at the expiration of that year.

FITZGERALD, J.—As a matter of history, tenancies from year to year, unknown in the time of Edward IV., became recognised when created by express contract in the time of Henry VIII., and by construction of law, to meet the exigencies of society, in the early part of the reign of George III. An ordinary tenancy from year to year is technically, and in contemplation of law, a tenancy for one year certain only, and in that light not greater than the tenancy under the present agreement. It is said that the 69th section of the Act cannot be thus construed, and that a tenancy from year to year is there to be interpreted in its popular sense as capable of existing for any number of years, and, therefore, greater than a tenancy for twelve months certain. But the Legislature in the Act of 1870 was dealing with matters legal and technical. If this popular interpretation is to be accepted, equally a tenancy from year to year would be greater in a like sense than a tenancy for two years certain, or five, or ten, or twenty years, as it might continue beyond these respective terms. I hold that the tenancy created by the agreement was not less than a tenancy from year to year, and, consequently, that the defendant was not entitled to notice to quit under section 69. That section seems to be intended to apply to tenancies at will and all other tenancies of a cognate character uncertain in duration, though capable of continuance, but liable to determination by some act of the landlord. I express no opinion as to whether a tenant under a contract such as is now before us may or may not be entitled to compensation for actual improvements.

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April 27,
June 22,
1874.

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v.
Tracey.

Fitzgerald, J.

FITZGERALD, B.—I think a tenancy for one year and no more, created by the express contract of the parties thereto, is not a tenancy less than a tenancy from year to year within the meaning of the Act of 1870. The Act deals with the tenancy from year to year according to its legal nature—*i. e.*, a tenancy at will

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becoming a term only by construction of law. The definition of tenant in the 70th section has, in my mind, plain reference to the 4th section of the Landlord and Tenant Act of 1860, which provides that every lease or contract with respect to lands, whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any "definite" period of time, not being from year to year or any lesser period, shall be by deed executed, or note in writing signed, etc. Here, I presume, if the language has any meaning, the words "lesser period" must mean "lesser *definite* period." I know of no "definite" period by a letting from year to year greater than one year. A letting for a year certain, and no more, is not a letting from year to year. How it can be a letting for a less "definite" period, I cannot understand. As to what may be the effect of the same section on lettings from week to week, or from month to month, I express no opinion.

O'Brien, J., concurred with Dowse and Deasy, BB.

Palles C.B

PALLES, C.B.—I am of opinion the defendant was not entitled to notice to quit. I agree with my brother Dowse that we cannot restrict the operation of the section to tenancies of an uncertain duration, and I also concur in his reasons for that decision. But I am of opinion that a tenancy for a year certain is not "less than a tenancy from year to year." The 69th section constitutes a tenancy from year to year a standard of duration; and the use of it as a standard seems to show that the Legislature regarded its duration as fixed and certain. What, therefore, is the duration, in legal contemplation, of a tenancy from year to year? In ascertaining it, we must exclude from our consideration all circumstances which may, but need not, arise during the course of the tenancy, and affect its duration; such, for instance, as the omission to serve a notice to quit. Such an omission will operate to extend the duration of

the tenancy; but whilst the possibility to serve such a notice exists as an incident of all tenancies of this nature, the omission of its use in any one case, or in any number of cases, cannot affect our estimate of the duration of the tenancy in the abstract. We are thus driven to ascertain what is the necessary duration incident to such a tenancy; and when we arrive at this point, all difficulty ceases. We find that such duration is a term fixed and certain—the term of one year.

WHITESIDE, C.J.—I concur in my brother Baron Fitzgerald's reasons for the conclusion that a tenancy for a year certain is not less in law than a tenancy from year to year. "A tenancy from year to year is considered as recommencing every year" (*Tomkins v. Lawrence*, 8 C. & P., 731); how, then, can it differ from a tenancy which, by the contract of the parties, begins and lasts in like manner for a year? I am of opinion that Judgment should be given for the plaintiff.—Donnell, 398, 443.

Exch. Ch.
April 27,
June 22,
1874.

Wright
v.
Tracey.

Whiteside,
C.J.

LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C., and
WRENCH, Commissioners.)

Land Com.
January 23,
1891.

Hagan v. Jackson.

Tenancy—Determination of—Surrender for the purpose of admission of another tenant—Surrender by operation of Law—Originating notice, Land Act, 1881, section 20, sub-section 1.

The acquisition by a tenant of a present tenancy, since the coming into force of the Land Law (Ireland)

Land Com.
January 23,
1891.

Hagan
v.
Jackson.

Act, 1881, of a small additional parcel of land previously in the hands of another tenant, and the fixing of a bulk rent by the landlord for the enlarged holding, has not the effect of destroying the present tenancy or the right attached thereto.

But as in such a case there are separate and distinct tenancies existing in the newly acquired parcel of land and in the original holding, they cannot be included in the same originating notice.—*Laverty v. Moore, Torrens v. Cooke*, referred to.

The Sub-Commission fixed a fair rent. From that decision the landlord appealed. Order of Sub-Commission discharged with liberty to tenant to apply to amend originating notice by confining it to one holding.—L.R.I., xxviii., 326.

LAND COMMISSION.

Land Com.
1891.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

McFarlane v. Trustees of Cinnamond.

M. was tenant of a holding under a judicial tenancy. On the 30th of December, 1889, he served notice of his intention to sell the holding, which notice was in the prescribed form No. 1, with these words written in after the words notifying such intention: "on Thursday, the 16th of January, 1890." He attempted to sell on January 16th, 1890, but failed; afterwards on October 4th, 1890, M. did sell to G., and on October 31st, 1890, served notice of the name of the purchaser, in Form 3. The landlord on November 7th, 1890, served an originating notice to have the sale declared void,

because no notice of intention to sell had been served, the tenant having moved to dismiss the notice.

Land Com.
1891.

Held, that the notice of 30th December, 1889, was sufficient notice of intention to sell for the sale to G., although served so long before such sale, and for a particular day. Section 1 of the Land Act, 1881, considered.

McFarlane
v.
Trustees
of
Cinnamond.

BEWLEY, J.—The notice appears to me in substance to intimate that it was the intention of the tenant to sell his tenancy, and that it would be put up for sale on the 16th of January, 1890. The notice was such as would have enabled the landlords to exercise their right of pre-emption if they had so desired. The power of a tenant to sell his holding should not be interfered with further than to give effect to the object of the statute; and a notice of intention should be so interpreted, if possible, so as to assist, and not destroy, the right of free sale, which the Act intended to promote. I am of opinion that the notice in the present case was sufficient; and the application to dismiss the originating notice served by the landlord must be granted.

Bewley, J

Fitzgerald, Q.C., Commissioner, concurred.—I.L.T.R. vol. xxv., 45.

LAND COMMISSION.

Land Com.
July 23,
1892.

(Before BEWLEY, J., and FITZGERALD, Commissioner.)

Reddy v. Elliott.

Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), section 20—Sale of present tenancy in consequence of a breach of a statutory condition—Meaning of—Action for rent—Sale by sheriff under fi. fa.—Right of purchaser to apply to Court to fix a judicial rent.

If a landlord recovers judgment against a tenant for rent, and the sheriff sells the tenancy under a *fi. fa.*, this

Land Com.
July 23,
1892.

is not a sale "in consequence of a breach of a statutory condition," so as to debar the purchaser from applying to the Court to fix a judicial rent.

Reddy
v.
Elliott.

Held, the sale contemplated by section 20 is a sale by the tenant pursuant to section 13, sub-section 1, where the landlord has brought an ejectment for non-payment of rent or upon notice to quit.—L.R.I., xxx., 653.

Land Com.
November 10,
1896.

LAND COMMISSION.

(Before BEWLEY, J., FITZGERALD, Q.C., and
O'BRIEN, Commissioners.)

Kelly v. Hamilton.

*Land Laws — Present or future tenancy — Land Law
(Ireland) Act, 1881, section 57.*

M. K. agreed in 1893 to take part of a large holding direct from the landlord as a future tenancy: Held, that the new holding was a future tenancy.

Boyd v. Tredennick (30 *I.L.T.R.*, 36) *distinguished*.

Appeal from an order of a Sub-Commission fixing a rent. The facts appear sufficiently from the Judgment.

Bewley, J.

BEWLEY, J.—In this case a question of future tenancy has been raised. The tenant undoubtedly holds under an agreement, dated the 1st July, 1893, whereby she agreed to become a future tenant of the present holding. It appears that this holding formed part of a larger holding held prior to 1893 by a man named John Griffin. An arrangement was then come to that this portion should be let direct by the landlord to Mary Kelly, and that a rent should be fixed accordingly by the landlord

for it. This arrangement was embodied in an agreement of the 1st July, 1893, by which she agreed to take the holding as a future tenancy. On behalf of the tenant it was urged that this case came within the principle of *Boyd v. Tredennick* (*ante*, p. 366) (30 I.L.T.R., 36), decided by this Court. But this case is plainly distinguishable. There an existing tenancy was partitioned with the sanction of the landlord, and a portion of it sold as an existing tenancy to another person; and the Court held in that case that the existing tenancy was a present tenancy. In this case the intention of the parties was to put an end to the old tenancy so far as this part of the holding was concerned, and to create an entirely new tenancy. The terms of the tenancy were regulated by the agreement of the 1st July, 1893, and in my opinion the agreement created a future tenancy. The order of the Sub-Commission fixing a rent must be discharged and the originating notice dismissed.—I.L.T.R., xxx., 158.

Land Com.
November 10,
1896.

Kelly
v.
Hamilton.

Bewley, J.

LAND COMMISSION.

(Before BEWLEY, J.)

Land Com.
Nov. 3, 11,
1892.

Thompson v. Templeton.

Land Law (Ireland) Act, 1881—Land Law (Ireland) Act, 1887—Re-instatement—Waiving statutory forfeiture.

A tenant who had been evicted was allowed to continue in the holding as caretaker. The landlord having died, his successor's agent received rent from the tenant, not only from the date when his principal's title arose, but also for a period of two months, during which his predecessor was living.

Held, that this was a waiver of forfeiture, and amounted to re-instatement.—I.L.T.R., xxvii., 55.

Appeal.
May 3, 4.
1887.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., and FITZGIBBON
and BARRY, L.JJ.)

Massy v. Norse.

Action to recover possession of lands—Lease by tenant for life for his own life—Expiration—Remainder-man—Present tenancy—Land Law (Ireland) Act, 1881, section 21.

By a marriage settlement lands, which were held for a term of years, were vested in trustees, upon trust for the settler for life, then for the husband for life, and afterwards, in the events which happened, for the wife (the plaintiff), for life. The settlement contained no leasing power of these lands. The owners of the two firstly limited life estates jointly made a lease to the defendant for their own lives; the survivor of the lessor died after the passing of the Land Act, 1881. Upon the death of the last surviving lessor, the plaintiff brought an action for the recovery of possession of the lands. The defendant, by his defence, pleaded that, upon the expiration of the lease, he was, as lessee, *bonâ fide* in occupation of the holding, and thereupon became, under section 21 of the Land Act, 1881, tenant of a present ordinary tenancy from year to year.

Held, on demurrer to this defence, affirming the Judgment of the Queen's Bench Division (O'Brien and Johnson, JJ.), that the statute had no application to the defendant's case, and did not create any such tenancy in him, and that the plaintiff's demurrer should therefore be allowed.—L.R.I., vol. xx., 464.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
June 20, 30,
July 26,
1894.

(Before WALKER, C., & FITZGIBBON & BARRY, L.JJ.)

Evans v. Peyton.

Agreement fixing a fair rent—Tenant for life—Inadequate rent fixed to the prejudice of remainder-man and incumbrancer—Fraud—Purchaser of tenant's interest for value, and without notice—Application to take Agreement off the file—Jurisdiction.

T. L. P., who was tenant for life of certain lands in the county of Leitrim under a will, by which his life estate was determinable upon bankruptcy, or upon a receiver being appointed, entered into an agreement on the 1st March, 1888, with a tenant E., to fix a rent of his holding, which comprised 44 acres, 1 rood, 25 perches, at £6 a-year. The rent had previously been £23, and the agreement was filed in the Land Commission on the 11th June, 1888. In September, 1889, T. L. P.'s estate became forfeited, and the next tenant for life, J. L. P., became tenant for life in possession. On the 28th August, 1889, E.'s holding was sold by public auction, subject to the judicial rent of £6, and E. became the purchaser. On the 25th July, 1893, an application was made by J. L. P., and E. S. P., an annuitant, for liberty to intervene, and that the fair rent agreement might be taken off the file, and declared null and void. On the 7th November, 1893, an order was made by Mr. Commissioner Fitzgerald, that the agreement should be removed from the file of the Court. R., the purchaser, was not represented on that application, owing to a miscarriage, and he subsequently applied to the Land Commission to vacate the order of the 7th November,

Appeal.
June 20, 30,
July 26,
1894.

Evans
v.
Peyton.

1893. On the 13th March, 1894, this application was refused, and R. appealed :—

Held, that whatever might have been done in the case of the original parties, as between R. on the one hand, and J. L. P. and the annuitant on the other, the orders of Mr. Commissioner Fitzgerald and of the Land Commission could not be sustained.—I.R., 1895, vol. ii., 127.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
April 30,
May 17,
1895.

(Before WALKER, C., SIR PETER O'BRIEN, C.J., and FITZGIBBON and BARRY, L.JJ.)

Monaghan v. Hinds.

Land Law (Ireland) Act, 1881—Future or present tenancy—Tenant from year to year existing at the passing of the Act—Tenant for life—Remainder-man succeeding subsequent to the date of the Act—Acceptance of rent from tenant.

In 1876 M. purchased the interest in a tenancy from year to year in 12 acres of land from R. J. H., who was tenant for life of the property. Later in the same year he acquired a tenancy from year to year in 12 acres, other portion of the same lands, at the rent of £12, from R. J. H., upon payment of a fine of £60. The gale days were January and July. R. J. H. died in May, 1886, and was succeeded by H. P. H., as tenant in fee in remainder, who took payment of the rent of the farm from M. at the same rate in July, 1886, and subsequently giving an abatement. There was no express contract between the parties for the creation of a present tenancy.

Held (affirming the decision of the Land Commission), that M. was a future tenant.—*Roulston v. Caldwell* (1895), 2 I.R., 136, distinguished.—I.R., 1895, vol. ii., 689.

Appeal.
April 30,
May 17,
1895.

SUB-COMMISSION.

(Before GREER, A.L.C.)

Sub-Com.
January 27,
1896.

Fitzsimmons v. Ellis.

*Land Law (Ireland) Act, 1881 — Status of tenant—
Tenant for life—Acceptance of rent by remainder-
man—Area, 4 acres, 1 rood, 10 perches—Rent, £12.*

GREER, A.L.C.—This case presents some peculiar features. On the 18th January, 1882, Mr. Hodder's Sub-Commission, sitting at Cavan, fixed a judicial rent of £27 15s. 7d. upon 23 acres, 3 roods, 33 perches, of which the area set out in the originating notice in this application—namely, 4 acres, 1 rood, 19 perches—was a part. The tenant in that application was a Mrs. Elizabeth Hopewell, and the landlord was the late Rev. Thomas Ellis. On the 11th April, 1882, Mrs. Hopewell surrendered her judicial tenancy in the 23 acres, 3 roods, 33 perches to the landlord, who was then tenant for life under a deed of settlement executed on the 15th May, 1880. Upon the 18th May, 1882, the Rev. Thomas Ellis re-let the dwelling-house and 10 acres of the lands to Mrs. Hopewell for her life at 10s. per annum rent, and at the same time he let the following three lots to a tenant named Grier—viz., 4½ acres at a rent of £22 10s.; 4 acres, 1 rood, 19 perches, at a rent of £12; and 4 acres, 1 rood, 29 perches at the yearly rent of £10 18s. Grier continued tenant of these three holdings during the lifetime of the Rev. T. Ellis, who died on the 12th June,

Sub-Com. 1888, and upon his death he was accepted as tenant by
 January 27, 1896. Mr. Ellis's son, the present owner, and who, as remainder-
 man, acquired an absolute estate in the property. Grier
Fitzsimmons continued to pay the rent of the holdings down to the
 v. year 1890, when he sold his interest in the lot containing
Ellis. 4 acres, 1 rood, 29 perches, and the lot containing
 Greer, A.L.C. 4 acres, 1 rood, 19 perches (the subject-matter of the
 present application) to the tenant, Michael Fitzsimmons.
 The tenant served an originating notice in respect of the
 4 acres, 1 rood, 29 perches, and the County Court Judge
 of Cavan fixed a judicial rent upon that holding. The
 landlord appealed, and the Land Commission confirmed
 the Judge's decision, and fixed the judicial rent at £6 10s.
 The landlord again appealed on a case stated by the
 Land Commission; but the superior Court upheld the
 Judgment of the Land Commission (see *ante*, p. 290)
 upon the legal points which had been raised in those
 proceedings. I understand the fair rent order made by
 Mr. Hodder's Commission on the 18th January, 1882,
 still remains upon the files of the Court. The contention
 of Mr. Allen, solicitor for the landlord, was that the judi-
 cial tenancy created by that order had been surrendered
 by Mrs. Hopewell in April, 1882, and that the lands
 having been re-let by the Rev. Thomas Ellis, who was
 only tenant for life, the letting by him could not bind
 the present owner. Now, the case may be cleared of
 any question regarding the fair rent order of April,
 1882. It was quite competent for the tenant, Mrs.
 Hopewell, to surrender her interest under it, and it is
 apparent that she received a very substantial considera-
 tion for doing so.

The question upon which this application must be
 decided is—What was the legal *status* of the tenant's
 predecessor Grier under the Land Law (Ireland) Act,
 1881, on the death of the Rev. Thomas Ellis in the year
 1888? Upon that point Mr. Kennedy, solicitor for the
 tenant, pressed me to hold that the present landlord

having accepted rent from Grier he was stopped from repudiating his tenancy, and that this Court should extend the benefit of the Land Act of 1881 to his client in respect of this holding, which was held under the same landlord and under the same tenure as the holding of 4 acres, 1 rood, 29 perches, upon which a judicial rent had already been fixed. In dismissing this application, as the Court is bound to do, the result may be the anomaly suggested by Mr. Kenny. Yet each case must be decided upon its own facts, and according to the existing law applicable to those facts. In this case the law is settled. Upon the death of the Rev. Mr. Ellis in 1888, Grier was, no doubt, accepted as tenant by the remainder-man; but a new tenancy was then created, and unquestionably, according to the decisions, that tenancy was a future tenancy. The authorities upon the subject are numerous and conclusive. In *Wakefield v. Hendron*, 11 L.R.I., the Vice-Chancellor held that where a tenant for life died, and the remainder-man allowed the tenant to continue in occupation as tenant to him, a new tenancy was created. In *Sparrow v. Hepenstall*, 24 I.L.T.R., 65, Mr. Justice Litton said that the estate of the remainder-man was a totally different estate from that of the tenant for life, and he could not be bound by the order fixing the fair rent. See also *Peyton v. Gilmartin*, 28 L.R.I., 378, and *Massey v. Norse*, 20 L.R.I., 464. We, therefore, dismiss this application. I have ascertained that when the Land Commission fixed a judicial rent of £6 10s. in respect of the other holding, containing 4 acres, 1 rood, 29 perches, the question of the Rev. Mr. Ellis being only tenant for life was not relied on, and under the circumstances each party will now bear his own costs of this application.

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SUB-COMMISSION.

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Robb v. Downshire.

*Land Law (Ireland) Act, 1887—Leasehold—Buildings—
Unsuitable to an agricultural holding—Area, 94 acres,
2 roods, 11 perches; valuation—land, £93; houses,
£44; total, £137; rent, £145.*

The Sub-Commission fixed the fair rent at £110 (Greer diss. as to amount). The Land Commission, on appeal (not reported), affirmed the decision, and restored the rent to £145.

GREER, A.L.C.—This holding, which is situate about four miles from Belfast, is held under a lease dated the 11th November, 1877, at the yearly rent of £145. The demise is for twenty-one years from the 29th September, 1877, and is made by the guardians of the Marquis of Downshire to Mr. William George Weir. Mr. Weir, who had been tenant under a former lease dated 1855, and made to his father, sold his interest on the 1st February, 1883, to Mr. Charles C. Connor for a sum of £1,900; and Mr. Connor, in consideration of £2,000, assigned his interest to the present tenant, Mr. Robb, on the 10th October, 1883. Mr. Orr, Q.C., appeared for the landlords, and advanced several grounds on which he called upon the Court to treat the holding as a residential one. I have considered the points raised by Mr. Orr, Q.C., and I am of opinion that there is nothing in the evidence that would remove the holding out of the category of agricultural holdings. Many of the leading decisions under the Irish Land Acts of 1870, 1881, and 1887 deal with what are known as residential holdings; and the principle enunciated

by the Judges in dealing with such cases is to the effect that, in considering what is or is not a residential holding within the meaning of those statutes, the Court should have especial regard to the purpose for which the letting was originally made. In this case the contract has been reduced to writing, and it is unnecessary to go behind the lease of the 11th January, 1855. That was a demise to one Thomas Weir of 94 acres, 2 roods, 11 perches, statute measure, for a term of twenty-one years, at the yearly rent of £120. It was an ordinary agricultural lease, containing the usual covenants to be found in such leases on Lord Downshire's estate; and amongst other provisions, it bound the lessee to pursue a certain course of husbandry, and at the end of the demise to have one-half of the farm laid down in pasture. It was executed at a time long prior to the passing of the Landlord and Tenant (Ireland) Act, 1870, and at a period when the term "residential holding" was comparatively unknown to legal draftsmen, and when it had not acquired the legal signification which it subsequently derived from successive measures of legislation. In these circumstances the lease of 1855 was executed; and it is entirely silent as to the holding having anything of the incidents or character of a residential holding then impressed upon it. The lands are described as "all that and those that part of the lands of Cornabreany, Cregagh, and Ballymaconaghy, containing by survey 94 acres and 13 perches, with the dwelling-house, out-houses, and buildings thereupon;" and the dwelling-house that was then standing upon it appears to have been an ordinary farmhouse, suitable to a holding of 94 acres. That lease ran its term, and expired in 1875, when Mr. William George Weir, the son of the lessee, had succeeded to the tenancy. Negotiations for a new lease for a further term of twenty-one years were entered into. With these negotiations I ruled that the Court

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Sub-Com. had nothing to do. Whatever their purport may have
November, been, they resulted in the execution of a new lease,
1890. dated the 11th November, 1877, and under that lease
the present application comes before us. I have said
Robb that the lease of 1855 was executed before any of the
v. Land Acts were passed which excluded residential or
Downshire. demesne holdings from their operation, but not so as
Greer, A.L.C. regards the lease of 1877. That demise was made after
the passing of the Act of 1870, and at a time when such
exempted holdings had been the subject of numerous
legal decisions; and the parties could not have been
indifferent to the importance of describing the holding
as residential if it had been meant or intended to regard
it as such. Yet, so far from doing so, the description of
the premises in the lease of 1877 follows the description
in the lease of 1855; and the covenants as to the system
of agriculture which was to be pursued by the lessee are
also identical with the covenants in that lease.

From these facts, which I regard as throwing a clear
light upon what was in the minds of both parties at the
time of the lettings, no doubt can be entertained as to
the purpose for which the holding was originally de-
mised—namely, as an ordinary agricultural farm, at the
yearly rent of £120—and that in the year 1877 it was
again demised for the same purpose at the increased
rent of £145. But, behind this, the question raised by
Mr. Orr, on behalf of the landlord, still remains—viz.,
that Mr. Robb, the present lessee, who is not a farmer
in the ordinary sense of the term, has so changed the
character of the holding by remodelling the dwelling-
house, and converting it into a substantial villa resi-
dence, as to exclude it from the operation of the Land
Acts. I have examined the authorities dealing with
residential holdings, and I cannot discover any decision
that would support Mr. Orr's contention. No doubt, the
buildings upon the holding are more suited for a gentle-
man's residence than for an ordinary farmer; but the

fact that the occupier of an agricultural holding is a gentleman, a clergyman, or a business man, does not of itself change the character of the holding; for, so long as it is occupied and used for the purposes of profit, and not as a mere residence or for pleasure, it retains its agricultural character. The same argument was used by counsel in *Crawford v. Egmont*, and the decision of the Court there was that a holding of 186 acres, held at a rent of £280, and on which there was a handsome gentleman's residence, was not excluded from the fair rent sections of the Act. Again, in *O'Callaghan v. Mahoney*, where 30 acres of land had been held by a Protestant curate at a rent of £42, the Court decided that the holding was agricultural and not residential. Having regard to all the circumstances of this case, I am clearly of opinion that the holding was let as an ordinary agricultural farm.

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There is one other matter to which I hardly feel bound to refer; but as the case is one of more than ordinary importance, I should not perhaps ignore it. Mr. Orr appealed to the Court not to fix a rent on the holding, on the ground that it was so close to the city of Belfast that it must in a few years become valuable for building sites, and that the effect of giving the tenant a judicial term would be to confiscate the landlord's interest in the property so far as its enhanced value for building purposes was concerned. But this is not so, as, by the 5th section of the Land Law (Ireland) Act, 1881, the landlord is empowered during the statutory term to resume the holding or any portion of it for building or other purposes having relation to the good of the holding or the estate. Now, as to the question of rent, I regret to say that the members of the Court are divided upon that subject. My colleagues, for whose judgment in such matters I have the greatest respect, consider the fair rent of the holding is £120, and at that sum it must be fixed. I cannot follow them in the

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conclusion they have arrived at, as having regard to the decisions I have referred to, and also to the principle laid down in kindred cases, I consider that Mr. Robb should be held to his bargain, and that the present rent should be confirmed.

[Not reported.]

See *Carson v. Molyneux*, *post*, also section 1, sub-section 3, Land Law (Ireland) Act, 1896.

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SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before WALKER, C., PALLES, C.B., and FITZGIBBON
and BARRY, L.JJ.)

Mairs v. Lecky.

Redemption of Rent (Ireland) Act, 1891—Land Law (Ireland) Act, 1887, section 1—Land Law (Ireland) Act, 1881, sections 8, 21—Land Act, 1887, section 4—Fee-farm Grant—Fixing fair rent—Improvements—Permanent buildings—Reclamation of waste land—Drains and fences—Ulster custom.

In 1874 M. purchased from a tenant from year to year his interest in a holding subject to the Ulster custom. In 1875 M. obtained from L., the landlord, a fee-farm grant of the holding. After purchasing the holding, M. executed improvements on the land, including the erection of permanent buildings, the reclamation of waste lands, and the making of drains and fences. In fixing a fair rent under the provisions of the Redemption of Rent (Ireland) Act, 1891, the Land Commission held that the grantee was not entitled to

be exempted from rent in respect of these improvements, and that the Ulster custom was not enforceable under the Act of 1870 against a holding under a fee-farm grant.

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Held (reversing the decision of the Irish Land Commission), that M. was entitled to have his interest in the permanent buildings and the reclamation of waste lands, but not in the drains and fences, considered in fixing the fair rent, the Court of Appeal giving no decision on the question raised as to the Ulster custom.

Adams v. Dunseath (*ante*, p. 141), 10 L.R.I., 109, discussed.

Mollan v. Kieran (*ante*, p. 114), 2 I.R., 27, overruled.

Appeal, by way of case stated by the Irish Land Commission for the consideration and decision of Her Majesty's Court of Appeal in Ireland.

The case stated was in the following terms :—

" 1. On November 2, 1891, the grantee in this case served an originating notice of an application in pursuance of the Redemption of Rent (Ireland) Act, 1891, to redeem his rent, and for an advance under the Land Purchase Acts, or, in case of the grantors not signifying their consent thereto in the prescribed time, to have a fair rent fixed. At the time of serving this originating notice, the grantee, the Rev. J. S. Mairs, was in possession of the holding described in the said notice under a fee-farm grant, dated September 22, 1875, made by Matilda Lecky and Hugh Lecky to the said grantee. The particulars of the holding thereby granted are described in the said originating notice, and are as follows :—area in statute measure, 18 acres ; rent, £18 ; and gross Poor-law valuation, £12.

" 2. The grantors did not signify their consent to the redemption of the said rent, and accordingly the originating notice duly came before a Sub-Commission (Bailey, A.L.C.) as an application to fix a fair rent ; and by an order of the Sub-Commission, dated the 27th

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day of July, 1893, the fair rent of the holding was fixed at the annual sum of £10 10s.

" 3. Notices of re-hearing were served by both the grantors and the grantee, requiring the case to be re-heard before three Land Commissioners sitting together at Belfast on February 19th, 1894.

" 4. From the facts proved before us it appeared that the farm is on an estate on which the Ulster custom of tenant-right is recognised, which custom authorizes the tenant of any holding subject to it on this estate to sell his interest in the holding, with the improvements on it, to any unobjectionable person, and that the holding in this case was, in the year 1874, purchased by the present grantee under that custom for the price of £100. At the time of the said purchase the holding was held under a tenancy from year to year at the yearly rent of £13; and Mr. Mairs, after his purchase, continued to hold under the said tenancy until he obtained the said fee-farm grant of September 22nd, 1875.

" 5. After his purchase the grantee made considerable improvements on the lands, including the making of drains and fences, the partial reclamation of portion of the holding by removing of rocks and boulders, and the erection of permanent buildings. For the purpose of this case it is unnecessary to state the particulars or value of these improvements.

" 6. On the part of the grantors it was contended that this case was ruled by the decision of *Kieran v. Mollan* (1), and that in fixing a fair rent the improvements claimed for were not exempted from rent. On the part of the grantee it was contended that said decision was erroneous, and ought not to be followed, and that in any case it did not apply to this farm, because the estate on which it was situated was an estate on which the Ulster custom of tenant-right existed, giving the tenant a right to sell his interest and improvements, as well as a right to compensation under

the Act of 1870, entirely irrespective of section 4, and the limitations thereby enacted.

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"7. No evidence was given that the Ulster tenant-right custom on this or any other estate extended to a holding held under a fee-farm grant; and we were of opinion that even if such evidence had been given, the Ulster tenant-right custom was not enforceable under the Act of 1870 in respect of a holding held under a fee-farm grant. We were also of opinion that this case was ruled by our decision in *Kieran v. Mollan* (1), and that the tenant was not entitled to claim exemption from rent in respect of improvements made by him, whether buildings, fences, drains, or reclamation; and we were of opinion that the judicial rent should be fixed at £18; but on the application of counsel for the grantee, we agreed to state the present case for the consideration and decision of Her Majesty's Court of Appeal in Ireland.

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"The questions submitted for such consideration and decision are :—

"1. Whether in fixing a fair rent a grantee holding under a fee-farm grant is entitled to be exempted from rent in respect of (a) buildings, (b) reclamation of waste lands, (c) drains, or (d) fences erected or made by him on his holding, or in respect of any and which of such classes of improvements.

"2. Whether the usages prevalent in the Province of Ulster, included under the denomination of the Ulster tenant-right custom in the Landlord and Tenant (Ireland) Act, 1870, are enforceable under that Act in respect of a holding under a fee-farm grant."

There is a report of the case before the Land Commission, and also before the Sub-Commission (Bailey, A.L.C.) in 28 I.L.T.R., 56.

(The following authorities were cited: *Adams v. Dunseath* (1); *Mollan v. Kieran* (2); *Lanyon v. Clinton* (3); *Wigglesworth v. Ballison* (4); *Lyon v. Read* (5).)

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The Court having intimated that they were prepared to deliver judgment on the first question argued, but that if their decision on the second question were required, the case must be re-argued; and the parties having consented to accept the decision on the first question:

WALKER, C.—This case raises two extremely important questions.

The premises, which contain 18 acres statute, and are situate in the County of Antrim, were originally held under a yearly tenancy at the rent of £13.

In the year 1874 Mr. Mairs, the applicant, bought the interest for a sum of £100; and on the 22nd September, 1875, he obtained a fee-farm grant at the rent of £18. The poor law valuation is £12. After his purchase he made improvements on the holding, consisting of permanent buildings, reclamation of waste lands, and drains and fences. I assume these were made after he had obtained the fee-farm grant, and the argument proceeded on that assumption.

The Redemption of Rent Act became law on the 5th August, 1891, and on the 2nd November, 1891, he served an originating notice to redeem his rent, and for an advance under the Land Purchase Acts, or, in case of the grantors not signifying their consent thereto in the prescribed time, to have a fair rent fixed.

The case proceeded under the latter alternative, and on the 27th July, 1893, the Sub-Commission made an order fixing the fair rent at £10 10s., on the basis that the grantee was entitled to be exempted from rent in respect of improvements.

There was an appeal, and the Head Commission fixed the rent at £18, on the basis that he was not entitled to exemption from rent in respect of any of his improvements; but they have stated a case for this Court, submitting two questions, the first of which is, whether in fixing a fair rent the grantee holding under

a fee-farm grant is entitled to be exempted from rent in respect of (a) buildings ; (b) reclamation of waste land ; (c) drains ; or (d) fences erected or made by him on his holding ; or in respect of any and which of such classes of improvements.

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The *status* of the applicant to apply to fix a fair rent under the Act of 1891, is not disputed.

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Inasmuch as the decision of the Head Commission was based on the assumption that it is a logical consequence of the decision in *Adams v. Dunseath* (1), that a grantee under a fee-farm grant who avails himself of the rent-fixing provisions of the Redemption of Rent Act cannot be exempted from rent in respect of any improvements made by him or his predecessors in title, it is necessary to see what was decided by the majority of the Court in that case, so far as material to the one before us.

The facts there were :—"The lands had been held under a yearly tenancy by James M'Kee ; and in 1842 the lands were valued, and a rent fixed on them of £26 11s. 6d.

A verbal promise of a lease was made which was not granted till 2nd March, 1846. The term was thirty years. Before it was actually granted M'Kee built a dwelling-house.

On the 27th October, 1846, he sold to Adams, who also made improvements in buildings, fences, and drains.

In 1869 Adams' son succeeded him as tenant, and he also made improvements in reclamation, fences, and drains.

On the 1st November, 1875, the lease expired, and the lands were revalued, and a rent of £31 17s. 6d. assessed.

On the 17th October, 1881, the tenant served an originating notice to fix a fair rent under the Act of 1881. The fair rent had to be fixed under section 8, sub-section 1 of which provides that the Court shall fix

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it "after hearing the parties, and having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district;" and it was also to be fixed under the absolute rule laid down by section 9: "No rent shall be allowed or made payable in any proceedings under this Act in respect of improvements made by the tenant or his predecessors in title, and for which, in the opinion of the Court, the tenant or his predecessors in title shall not have been paid or otherwise compensated by the landlord or his predecessors in title."

It was contended for the landlord, notwithstanding these words, that "improvements" must be read as qualified and limited by all the restrictions contained in the provisions of the Act of 1870 as applicable to each state of facts there mentioned, and that this was made possible by the use of the words "otherwise compensated," in sub-section 9, and the words "interest of the landlord and tenant respectively," in the first sub-section.

For the purpose of arriving at a conclusion on the questions which the case presented, the learned Judges formulated five questions of law, the first and third of which only are material to the present:—

1. What is the meaning of the word "improvements" in the 9th sub-section of section 8 of the Land Law Act, 1881?

2. Are the provisions of the final paragraph of the 4th section of the Land Act of 1870 (as to a tenant claiming compensation for improvements made before the passing of that Act) applicable to such improvements in determining what is a fair rent under the 8th section of the Act of 1881?

Lord Chancellor Law was the only one of the seven Judges who answered that question in the negative. He was of opinion the words of sub-section 9 were too clear to be controlled.

But all the Judges held, and necessarily held, that "improvements" must receive the definition given to it by the Act of 1870; but, except the Lord Chancellor, they held that the true basis of the enactment in the 9th sub-section was the right to receive compensation on quitting under the Act of 1870; and then there must be attached all the provisions and qualifications annexed to each particular case by the 4th section of the Act of 1870. The point is put in a few sentences by the Lord Chief Baron at p. 154. After referring to the five provisoes engrafted by the 1st sub-section of the 4th section of the Act of 1870 on the general words "all improvements," and also to the 3rd sub-section, he proceeds: "These provisoes show that works which add to the letting value of and are suitable to a holding (and, therefore, improvements within the 70th section) are not, although made by the tenant or his predecessors in title, necessarily improvements in respect of which the tenant has a *right* to receive compensation. That he may have this *right* in respect of them, the works must, in addition, be outside the first, second, and third provisoes, and the amount of compensation he had a *right* to receive in respect of such works is liable to reduction in respect of the matters mentioned in the final clause of the 4th section."

I accept, as is my duty, these conclusions. They are, while the law remains as it is expounded in *Adams v. Dunseath* (1), absolutely binding upon me; and though I may entertain an opinion of my own, I express none, and I shall now proceed to apply these conclusions to the case before the Court.

I shall first assume the tenant here to have made these improvements during the currency of a lease for thirty-five years, and that this lease had expired, and that he was applying under the provisions of section 21 of the Act of 1881 to fix a fair rent.

I apprehend that his position would be too clear for

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argument, and that as he held under a lease for a term certain of not less than thirty-one years, he would be entitled to have exempted from rent his improvements in permanent buildings and reclamation of waste land, but not drains and fences. The 3rd sub-section of section 4 of the Act of 1870 is conclusive on this, when once made applicable to "improvements" mentioned in section 8 of the Act of 1881. Let us now take a second case, viz. :—Suppose that the tenant held under a lease which would expire within ninety-nine years after the passing of the Act of 1881, and that he was applying under the Act of 1887, what would be his position? He makes his application at the prescribed time and in the prescribed manner, and the result is "such lessee shall, if *bonâ fide* in occupation of his holding, be deemed to be a tenant of a present tenancy in like manner and subject to like conditions, and subject to the same right of resumption as if his lease had expired; and his holding shall be subject to all the provisions of the said Act of 1881 with regard to present tenancies as if the tenancy therein were a tenancy from year to year."

Thus he becomes, by virtue of the imputed expiration of such lease, an imputed yearly tenant, subject to all the provisions of the Act of 1881 with regard to present tenancies; and one of these is that he may fix a fair rent, and do so as provided by section 8. And this at once puts him into the position of the first applicant I have mentioned. He is entitled to be exempted from rent in respect of permanent buildings and reclamation of waste lands; and I think it follows his lease cannot be treated as in any sense continuing for the purpose of depriving him of any right which the statute confers as incidental to fixing a fair rent.

But the legislation had not yet brought in a considerable class which had been left outside its scope—viz. : (1) a lessee whose lease expired more than ninety-nine

years after the passing of the Act of 1881 ; (2) a lessee of a renewable lease ; (3) a lessee of a perpetual lease ; and (4) a grantee under a fee-farm grant, including one who, as here, is a tenant by reason of its being made after the Act of 1860 ; and the Legislature considered it desirable to give to such the benefits which had been already given to a more limited class by the Act of 1887. Accordingly, by the Redemption of Rent (Ireland) Act, 1891, section 1, it is provided that "where a person in *bond fide* occupation of a holding to which Part I. of the Land Law (Ireland) Act, 1881, applies, is a lessee under a lease to which the provisions of section 1 or section 3 of the Land Law (Ireland) Act, 1887, do not apply by reason of the period of its expiration, or by reason of its being renewable or perpetual, or is a grantee under a fee-farm grant, and such person holds his land at a rent which the Land Commission considers, having regard to the renewal fines (if any) and all the circumstances of the case, holding, and district, to be a full agricultural rent, such occupier shall, subject as is hereinafter mentioned, be entitled to apply in the prescribed manner to redeem his rent ; whereupon, if the lessor or grantor, as the case may be, signifies his consent," the redemption shall be effected as thereby prescribed ; and if the consent is not given, the lessee or grantee, as the case may be, "shall be deemed to have made the prescribed application under section 1 of the said Act of 1887, and *shall be held to be* a tenant of a present tenancy in manner and subject to the conditions and rights of resumption mentioned in section 21 of the said Act of 1881, as modified by section 1 of the said Act of 1887, and his holding shall be subject to the provisions of the said Acts with regard to present tenancies." At once he steps into the benefit of the Act of 1887, and of section 21 of the Act of 1881, and through them into section 8 of the latter Act. His right to fix a fair rent

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is not disputed ; but the terms are. Why should not sub-section 9 apply to him? Does the 1st sub-section apply? "The tenant of any present tenancy to which this Act applies may from time to time during the continuance of such tenancy apply to the Court to fix the fair rent to be paid by such tenant to the landlord for the holding, and thereupon the Court, after hearing the parties, and having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district, may determine what is such fair rent." I could understand, though I could not follow the argument, that, notwithstanding the Act of 1891, he is still not entitled to fix a fair rent because he is not a tenant. The argument is this : a person cannot claim exemption from rent unless he could claim compensation for improvements under the Act of 1870. A man cannot claim compensation for improvements unless he is a tenant, and a grantee under a fee-farm grant does not come within the definition of a tenant in the Act of 1870, and never could get compensation under that Act. That is, that having imputed to him the *status* of a present tenant, notwithstanding his position as grantee, you are, for the purpose of depriving him of rights incidental to the imputed *status*, to remit him to his original *status* as grantee, and deprive him of the imputed one, on which all his conferred rights rest. The logical result of that construction would be either that he should not be entitled to fix a fair rent at all, or that he should be exempted under sub-section 9 from rent in respect of improvements of all kinds. I do not think it would be possible to give the fee-farm grantee higher rights than a lessee, say, for 999 years ; while I do not think it was intended to give him the same.

In this respect I differ from the decision in *Kieran v. Mollan* (1), as well as from that in the case before us.

Therefore I think we should answer the first question

by stating that a grantee under a fee-farm grant is entitled to be exempted from rent in respect of buildings and reclamation on waste lands, but not in respect of drains and fences.

Appeal.
Feb. 19, 20, 27,
1895.

Mairs
v.
Lucky.

Barry, L.J.

BARRY, L.J.—I was not a member of this Court when *Adams v. Dunseath* (1) was decided, and this is the first occasion on which the decision in that case has been submitted to my judicial consideration. It certainly is not easy to read that case without having suggested to one's mind the inquiry—Why, if the general words of sub-section 9 of section 8 of the Act of 1881 were not intended to receive their ordinary grammatical meaning, but were to be read as controlled by the words “having regard to the interest of the landlord and tenant respectively,” that intention was not expressed in plain language? On the other hand, if it was intended that the words “having regard to the interest of the landlord and tenant respectively” were not to control the 9th sub-section, it is hard to see why the draftsmen put them into the 1st sub-section, the meaning of which, if they were omitted, would be unchanged—as a “fair rent” must *ex vi termini* “have regard to the interest of the landlord and tenant respectively”—and in which, if they are to be limited to it, they are a mere pleonastic expression.

However, with that we have now nothing to do. We have only to construe the Redemption of Rent (Ireland) Act, 1891, in the light of *Adams v. Dunseath* (1), and in doing that it is not necessary for me to say anything beyond that I entirely agree with the Judgment of the Lord Chancellor, the Lord Chief Baron, and my brother FitzGibbon, viz., that we must answer the first question put to us by the Land Commission in the affirmative, so far as relates to permanent buildings and reclamation of waste lands.

Palles, C.B., and FitzGibbon, L.J., concurred.—I.R., 1895, vol. ii., 475.

County Court.
June,
1872.

COUNTY COURT.

(Before P. J. BLAKE, Q.C., C.C.J.)

Jolly v. Archdall.

BLAKE, Q.C., C.C.J.—What are the characteristics and meaning of tenant-right? It may be divided into three phases. The first is that the tenant shall remain in possession of his holding, whether he holds under a lease or otherwise, subject on the fall of the lease to a revision of the rent, and subject in case there is no lease to a periodical and reasonable revision of the rent. The tenant is to remain in possession in this way, and under these circumstances, and that is tenant-right. I believe this tenant-right originated in the peopling of this province at a certain period, and I believe that just as the landlord got his grant of the forfeited lands, taken from the former rebellious owner or chieftain for his disloyalty, so also did the imported tenants get their rights to remain on the lands, the rent being at intervals of from twenty to thirty years periodically revised. The next stage of tenant-right is this. Suppose the tenant not to be remaining in possession, but that he is parting with his interest in the property by transfer or assignment. The usage in that case was that the tenant should be at liberty to do so, but that the landlord at the same time should have the right of veto—the right to say, “I won’t accept that man as my tenant,” and to continue to say that as long as there was any reasonable objection to the proposed new tenant’s solvency, character, etc. That veto did not by any means amount to saying, “I won’t let you sell at all.” This part of the tenant-right was simply that the tenant should have the liberty of substituting a man equally good with himself

as the future occupier of the holding. In connection with this we are to inquire what was the price to be paid to the tenant. The outgoing tenant pocketed the price of his interest in the property—a sum which was differently regulated on various estates. In some cases the landlord fixed it; on other estates it was limited to a certain number of years' purchase, and on others the old tenant was freely allowed to sell by public auction. All these apparent differences don't alter the custom; they are not, to speak in the language of logicians, the essential attributes of it, but merely the accidents. Where these rules are permanently established on the estate, I would say they are absolutely binding; and I dismissed the claim of *Noble v. Sir Victor Brooke, Bart.*, because the former bought the farm contrary to the known fixed rules of the estate. Mr. Sankey, the agent, afterwards recouped the man to a great extent. I maintain these rules where they are fully established, and I look upon them as the characteristics of tenant-right on the particular estate. The next stage or phase of tenant-right is: suppose he is not selling, but that the landlord is taking the holding to himself; if the landlord takes the land into his own hands, it is a question of law whether we have authority to make the landlord pay on coming into possession the full marketable price—whether we are not to restrain him by an injunction to let the tenant sell.

NOTE.—The claim in the above case was one for tenant-right, the landlord evicting the tenant on the expiration of a lease. The Judge, though expressing grave doubts, gave a decree for tenant-right. An appeal was taken and heard before Lawson, J., who dismissed the claim for tenant-right, on the ground that the evidence did not satisfy him that tenant-right existed at the end of a lease. The learned Judge gave a decree for improvements under section 4.—Donnell's Reports, 327.

County Court.
June,
1872.

Jolly
v.
Archdall.

Blake, Q.C.,
C.C.J.

Appeal.
April 28,
1893.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before WALKER, C., FITZGIBBON and BARRY, L.JJ.)

Wall v. Eyre.

The tenant of a holding consisting partly of lands and partly of tolls of a fair, cannot have rent fixed upon the holding unless the tolls form so insignificant a portion of the holding as to be practically non-existent.

The Sub-Commission fixed a fair rent; the Land Commission reversed this decision, and dismissed the originating notice. The Court of Appeal affirmed the decision of the Land Commission.

Walker, C. WALKER, C.—The lease here demised not only a piece of land which, from its character, comes within the Land Act of 1887, but also another specific subject-matter—tolls, an incorporeal hereditament—which by no possibility, if demised by itself, could be treated as coming within that Act.

The only way in which it was argued that the Court has power to fix a fair rent here was that the subject-matter of the holding must be treated as being nothing but land, by reason of the tolls having become so diminished in value that they are not to be taken into account. But what are we to fix the rent upon? Mr. Matheson urges that we are to fix the rent on the land only. We cannot do this, for the rent issues out of the tolls as well as the land. Of course, we might fix a rent upon the land alone if we could hold that the tolls had become non-existent, upon any legal principle, as, for instance, by forfeiture. For in that event they

might be possibly treated as wiped out of the demise. But confessedly, we cannot treat the tolls in that way here, for the tenant has been collecting them yearly, though the amount received may be small. After the fair rent was fixed, is the tenant to go on receiving the tolls, though small, or is he to cease to receive them altogether—an act which might affect the franchise? When we refer to the cases of *Boyle v. Foster* (*ante*, p. 174), (1), *Mooney v. Willcocks* (*ante*, p. 417) (2), and *Leonard v. St. Leger Barry* (3), we see that the present principle embodied in them applies *a fortiori* to the present. For in those cases the portion of the demise, the incorporation of which with the rest excluded the tenants from the Land Acts, was land *prima facie* agricultural or pastoral. The present holding includes a subject-matter quite distinct from land—something which under no state of circumstances that can ever arise will become either agricultural or pastoral, and over which the Land Acts give no jurisdiction to fix a fair rent. We cannot treat these tolls as out of the holding; and I think, further, that the doctrine of triviality does not apply at all, and that the tenant cannot rely on the doctrine of *de minimis non curat lex*.

FitzGibbon and Barry, L.JJ., concurred.

Appeal disallowed.—32 L.R.I., 475; I.L.T.R., 27, 87.

NOTE.—Section 5, sub-section 2, of the Land Law (Ireland) Act, 1896, provides “that where a distinct and substantive part of the property held under one demise is demesne land, or is not agricultural or pastoral in its character, or is an incorporeal hereditament, and the Court consider that that part is not the substantial part of such property, the Court may, if they are of opinion that, apart from the fixing of a fair rent, the separation of the property into two parts will not diminish the value of the landlord’s interest therein, direct that that part shall henceforth be, or if it is an incorporeal hereditament, be treated as, a separate holding, and the Court

Appeal.
April 28,
1893.

Wall
v.
Eyre.

Walker, C.

Appeal.
April 28,
1893.

may fix a fair rent on the remainder of the property held under the demise."

Wall
v.
Eyre.

This section is not retrospective as regards holdings in respect of which a judicial rent has been fixed prior to the 15th August, 1896. (Sub-section 4.)

ASSIZES.

Assizes.
1872.

(Before LAWSON, J.)

Leitrim, Appellant; Gallagher, Respondent.

Landlord and Tenant (Ireland) Act, 1870.

A field near a village in the County of Donegal, in the occupation of a person living in the village, held not to be a town-park.

Where separate rent receipts are given by the same landlord to the same tenant in respect of a house and field, the house, being in a village, is not within the operation of the Land Act, 1870.

Quære—Does section 15 apply to the Ulster custom?

LAWSON, J.

LAWSON, J.—I think that the house and field were held separately, and that the tenant is not entitled to any compensation with respect to the house. I do not think that a field situated as this one is comes within the denomination of "town-park," Milford being a poor village; and I hold that the field (which is subject to the custom) is within the operation of the Act. I believe the evidence of value now given to be correct, and, therefore, I alter the decree, and award £18 in place of £12.—6 I.L.T.R., 133.

ASSIZES.

Assizes.
1873.

(Before DOWSE, B.)

Daly v. Scott.*Landlord and Tenant (Ireland) Act, 1870.*

A holding of 3 acres, with three houses on it, in one of which, abutting on the street of Bundoran, the claimant lived, and the land stretching behind the house, held not to be town-parks.

Mr. Scott, the landlord, appealed from the chairman's decree, giving £125 for the tenant-right of a holding of a little more than 3 statute acres. On the holding, which had dwindled down from one of 9 acres, by sales of portions for building ground, were three small houses, in one of which the claimant lived. The house abutted on the street of Bundoran, and the land was just behind the house. It had been portion of the Connolly estate, on which it was admitted that unrestricted tenant-right prevailed.

Held, that the holding in question was not town-parks, the tenant residing on the holding; but on the evidence of value, the learned Judge reduced the decree to £100.—Donnell's Reports, 388.

Assizes.
1876.

ASSIZES.

(Before PALLES, C.B.)

Chism v. Beatty.

*Landlord and Tenant (Ireland) Act, 1870—Town-parks
—Increased value as accommodation lands.*

The claimant held 6 acres within three-quarters of a mile of Castlederg, a town of between 800 and 1,000 inhabitants. He resided in the town until after the service of the notice to quit, and he grazed and laboured the land in rotation.

The tenant-right custom was admitted to exist on the estate. The County Court Judge, Sir Francis Brady, Bart., Q.C., held that the holding was agricultural.

The sole question was whether the holding fell within the definition of town-parks in section 15 (1) of the Act of 1870.

Palles, C.B.

PALLES, C.B.—To constitute a town-park under section 15 of the Land Act, the holding should fulfil three conditions. First, it should adjoin or be near to a city or town; secondly, it should bear an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm; and, thirdly, it should be in the occupation of a person living in such city or town or the suburbs thereof. For the purposes of my decision I shall assume, although I do not decide, that Castlederg is a town within the meaning of the section, and that the holding in question is near to this town. It is admitted that the claimant lives in Castlederg; therefore, I assume that the first and third conditions have been fulfilled, and thus the question in the case is reduced to the consideration of the second: Do these

lands bear an increased value as accommodation land? There appears to be no doubt that the lands are more valuable than lands of a similar quality situate at a greater distance from Castlederg; and the conclusion that I draw from the evidence is that the lands bear this increased value as a farm, and when occupied as such. The case is an instance of that which is the experience of us all—that distance from the nearest market town is often an element in determining the value of a farm. The value of such a farm, although it may be called “increased value” as compared with the value of a farm of similar quality in a different locality, is, in truth, no more than the normal or ordinary value of the particular land occupied as a farm. This value is not an increased value within the meaning of the Land Act. The standard prescribed by the 15th section is “the ordinary letting value of land [*i.e.*, the particular land] occupied as a farm.” To render its actual value an increased value within the section, it must be an increased value over and above its ordinary letting value as a farm, and the element from which the increased value must be derived is the land being “accommodation land.”

What is “accommodation land”? I agree in the opinion expressed by Baron Fitzgerald in *Hodgins v. Dunally*, that it means land taken by a person residing in a city or town for the accommodation of his residence in the city or town. I am not satisfied that the farm in question was taken or used for this purpose, and I am of opinion that the value the lands bear is to be attributed not to any particular purpose for which they have been taken or used, but to the locality in which they are situated, and that such is their ordinary value as a farm. For these reasons I am of opinion the lands are not town-parks, and I affirm the decision of the Chairman, with costs.—Donnell's Reports, 506.

Assizes.
1876.

Chism
v.
Beatty.

Palles, C.B.

Land Com.
1882.

LAND COMMISSION.

(Before O'HAGAN, J., LITTON, Q.C., and VERNON,
Commissioners.)

Gilmore v. M'Kelvey.

*Land Law (Ireland) Act, 1881 — Town-park — Recent
letting—Value.*

The Sub-Commission (Greer, A.L.C.) dismissed the originating notice.

O'Hagan, J. O'HAGAN, J.—The holding has undoubtedly many of the elements of a town-park. It is near the town of Kircubbin: it is in the occupation of a person living in the town, and bears an increased value by reason of its proximity to the town; but the serious question arose, whether a town of 600 inhabitants was a town in the meaning of the Act of Parliament, and having regard to the use of the word "suburbs" in the Act. And another question was, whether, being taken and incorporated as part and parcel of an agricultural holding, and not being used for the accommodation of the tenant's town house, whether it can now be considered a town-park; and, on the whole, the Court does not think there was sufficient evidence for us to disturb the Judgment of the Sub-Commission, having regard to the fact that Mrs. M'Kelvey did not appeal from the decision.

With respect to the question of value, the Court is perfectly unanimous. One cannot help having a certain feeling with respect to a gentleman who having in 1878 voluntarily and without coercion taken a couple of fields outside the town from a lady, not very wealthy, at a rent of £30 a-year, comes in the year 1882, and seeks to get a perpetuity in that land as against her at a rent

of £12 15s. I have no doubt Mr. Gilmore reconciled himself to the transaction ; but there are many people who would not. The Court valuer fixed the farm as it stood at £26, and the Act of Parliament tells the Court they are to take the circumstances of the case and district into consideration ; and when we find an intelligent man, well knowing the value of land, takes for his own benefit—not for his livelihood, having a trade in the town—an additional piece of land for him to use, at a sum of £30, and now when we find him coming in and asking to have it for less than that, we have very little difficulty in saying the Sub-Commissioners came to a perfectly right conclusion in holding him to his bargain, and accordingly we shall confirm the decision with costs.—M'Devitt, 201.

Land Com.
1882.

Gilmore
v.
M^r Kelsey.

O'Hagan, J.

LAND COMMISSION.

Land Com.

M'Carthy v. Travers.

The Sub-Commission fixed a fair rent—the Land Commission dismissed the originating notice.

The holding is situated near Timoleague, immediately at the rear of the houses in that town or village.

BEWLEY, J.—In order to exclude a holding of the kind from the benefits of the Land Acts, three conditions must exist—first, it must be near a city or town ; secondly, at the time of the passing of the Land Act of 1881, it must have been in the occupation of the tenant living in the town ; and thirdly, it must have increased value as accommodation land over and above its ordinary value if merely for farming purposes. First, as to whether a holding was near a city or town, in various

Bewley, J.

- Land Com. Judgments in cases since the passing of the Land Act of 1870, regard was had as to the population in considering whether a place was a village or a town. However, in a late case that went to the Court of Appeal—*Archer v. Lord Caledon*, see *post*—it was decided that was wrong, and that no distinction should be made between a town and a village, provided the place was sufficiently large to create a demand for accommodation lands, and accordingly enhance the value of them. (See Judgment of Walker, C., in *M'Cann v. Downshire*, *post*.) The Land Commission were as completely bound by that decision of the Court of Appeal as they were by the Act of Parliament which they were appointed to administer. According to the last census, the population of Timoleague was 366. It was a place with fairs and markets, and the Commissioners were satisfied that there was a demand for accommodation lands, and that this particular holding was so circumstanced it was obviously let for accommodation purposes. They were bound to hold that the first condition of the town-park existed in the case. It was also in the occupation of a tenant living in the town, and bore an increased value as accommodation land. Therefore, it was a town-park within the meaning of the Act of 1881, and the Commissioners would accordingly discharge the order of the Sub-Commission, and dismiss the originating notice.
- [Not reported.]
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SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

Appeal.

(Before LORD ASHBOURNE, C., FITZGIBBON, BARRY,
and WALKER, L.JJ.)

M'Donald v. Orme.

Originating notice dismissed by Kane, Q.C., County Court Judge of Wicklow—Land Commission reversed decision—Court of Appeal affirmed the decision of the Land Commission.

The tenant held two pieces of land near Bray, one at a rent of £30, and the other at a rent of £40, and applied to have fair rents fixed. The County Court Judge dismissed the application, on the ground that the holdings were town-parks. At the hearing before the Land Commission questions were raised as to whether the applicant, who had not taken out administration to his father, had the *status* of a tenant, and also as to whether the holdings were separate or constituted one holding. The Land Commission held that the lands were agricultural, and remitted the case to the County Court Judge to fix a fair rent.

ASHBOURNE, C.—The holdings were separate a great number of years ago, but they adjoined each other, and latterly only one rent had been paid and one receipt given, the gale days for the two parcels being the same. The Land Commission, on the motion of Mr. Healy, had consolidated the holdings, and in doing that they were quite right. Taking the holdings to be one, was it a town-park? In his opinion the holding came within the saving clause of the Act of 1887, and, therefore, the Appeal should be dismissed.

- Appeal. FitzGibbon, L.J., concurred, holding that the parcels of land were one holding, and that the agricultural character of the larger had been imparted to the smaller.
- McDonald v. Orme.*
- Barry and Walker, L.JJ., concurred.
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Land Com.
1891.

LAND COMMISSION.

Mintern *v.* Babington and others.

Land Law Act, 1881, section 58—Land Law Act, 1887, section 9—Three small plots of land near a town held under three different landlords, the tenant being a shopkeeper residing in the town.

BEWLEY, J. (reversing the decision of the Sub-Commission).—The real question was whether each of the three holdings let and used as an ordinary agricultural farm, might be included in the operation of the Act of 1881. The three leases were ordinary leases, with nothing on the face of them to show that the lands were regarded as accommodation lands. Mr. Mintern was a shopkeeper in the town of Passage; but he also held an extensive farm of 46 acres, which he appeared to have cultivated as an ordinary farm, and in the evidence the Court found no difference in the treatment of the three plots and the treatment of the large farm. The Court, therefore, held that the three plots were let as ordinary agricultural farms, and were used as such. Case remitted to Sub-Commission to have fair rents fixed.—I.L.T., vol. xxv., 28.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

Appeal.
December 14,
1891.

(Before LORD ASHBOURNE, C., PALLES, C.B.,
FITZGIBBON and BARRY, L.JJ.)

Taggart v. Macnaghten.

Land Law (Ireland) Acts, 1881, 1887—Town-parks.

The Sub-Commission (Greer, A.L.C.) fixed a fair rent. The Land Commission affirmed. Landlord appealed. The tenant, who is a merchant in Bushmills, took 30 acres of land about 300 yards from the town in 1865, at a rent of £52, from Sir Francis Macnaghten ; he grazed cows on it, and sold the milk and butter, with other commodities, in his shop. He had on the holding a powder magazine, and in addition to the lands in question, he farmed about 100 acres, which he held from the same landlord.

The Court of Appeal affirmed the decision of the Land Commission, holding that on the evidence the land was used substantially as a farm and not merely as accommodation land ; and the appeal was accordingly dismissed with costs.

Appeal.
1892.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before WALKER, C., SIR PETER O'BRIEN, C.J., and
FITZGIBBON and BARRY, L.JJ.)

Daly v. Wright.

In construing the words "is let and used as an ordinary agricultural farm" the Court is not limited to the user at any particular date, but must look to the substantial user of the lands during the whole term.

If the holding be within the definition of "town-parks" contained in section 58 of the Land Law (Ireland) Act, 1881, the onus of proving that it comes within the exception created by section 9 of the Land Law (Ireland) Act, 1887, rests upon the tenant.

Appeal from an order of the Land Commission dismissing the originating notice of the tenant seeking to fix the fair rent of his holding. Appeal dismissed.

Walker, C.

WALKER, C.—This is an appeal which raises a question of some interest, as it involves the consideration of the words in the Act of 1887, "is let and used as an ordinary agricultural farm."

Mr. Bushe contends that the only user which we are at liberty to consider is the user which existed at the date of the passing of the Act of 1881, and for this proposition he cites the case of *Nelson v. Headfort* (2).

I think, having regard to the words "is let and used," we are not limited to the user at any particular date, but that we must look to the substantial user during the whole term; and that we have to consider the eight years' user by Daly.

Mr. Bushe then, pursuing his argument, takes up the nine words of the Act which I have quoted, and he says

the instrument of letting here lets those lands as a farm would be let. The original tenant is described as a farmer, and so far as regards the use (for he does not contend he must make out both the letting and the use) he says his client grows oats and feeds cattle, that there is a user proper in the case of an ordinary agricultural farm, and when once that physical use is found, the legislation is satisfied, and his client is within it.

Appeal.
1892.

Daly
v.
Wright.

Walker, C.

It has not been contended for the landlord that this farm is excluded by the words "agricultural farm," which has been assumed to be equivalent to "agricultural and pastoral;" and I only notice this point for the purpose of saying that I express no opinion on it, as it has not been argued. But for the purpose of testing the argument founded upon the use, it is necessary to trace the legislation.

In 1881, while the Legislature had the object of fixing tenants in the soil by the process of fair rents, it had also the object of leaving intact the townsman's accommodation which existed in the neighbourhood of cities and towns; and it did that by section 58 by the three descriptions attached to "holdings ordinarily termed town-parks," which might all co-exist with such a letting and use as exist here.

It will be observed that a town-park under section 58 is excluded, though it is agricultural or pastoral, or partly both; because if it were not such, it would be excluded by other provisions of the Act; and further, it is difficult to imagine any town-park which does not, in course of management, receive the use similar to what a farm receives. The growth of oats and feeding of cattle are ordinary uses of a town-park and farm. When, therefore, the Legislature in the Act of 1887 superadded words to found an exclusion from an exclusion, it must be assumed they intended to describe a character of holding which would not only have incidents already common to all town-parks, but be in

Appeal.
1892.

Daly
v.
Wright.

Walker, C.

its tenure and use something different from the subject-matter which is in tenure and use that townsman accommodation which even the Act of 1887 carefully preserves.

It may not be easy to give an exhaustive definition of what is an "ordinary agricultural farm." The onus in each case is on the tenant to show that his holding comes within the words ; and I think it is impossible to leave out of sight all the circumstances, including the personality of the tenant, when you have to ascertain the character of the letting and use.

These lands were originally demised to a man named Wallace. The letting was made by lease in the year 1860 ; and on the evidence we might possibly hold that the letting to Wallace and the user by him were consistent with its being an ordinary agricultural farm. Wallace, however, seems to have given up farming ; he built himself a hotel on some land adjoining this holding, and in 1876 he assigned his interest in the lease to Regan. No doubt, in the assignment, Regan, who lived in the town of Dunmanway, is described as a farmer ; but he was a cattle-dealer, a milk contractor, had a dairy in the town ; he speculated in cattle, and carried on his cattle-dealing till his health failed ; and as an inference of fact, I draw the conclusion that Regan neither acquired nor used these lands as an ordinary agricultural farm, but, on the contrary, as accommodation lands.

On Regan's death, the respondent Daly purchased from Regan's executors the lessee's interest in the lease. Daly is a publican, living in Dunmanway, who deals in meal and flour, keeping, in fact, a general store. He keeps cows on the holding, and uses some of the milk for the purpose of his residence in the town ; he further says that he has sometimes grown oats on the lands, and sold them in the store. The evidence given by Daly, upon whom the onus lies, is very vague and unsatisfactory. When Mr. Powell asked him, "Was it not to

accommodate your place of business in Dunmanway you took the place?" he answered, "I was always accustomed to farming, and I was not long living in Dunmanway when I took it; I was only a year there." Mr. Powell accepted this evasive answer, and did not probe the matter further. I think he exercised a sound discretion in this. The onus lay on the tenant to show that he used the holding as an ordinary agricultural farm, and, in my opinion, he has failed to satisfy that onus. The inference I draw from the evidence is, that he is a town dealer using this holding as accommodation land; and I think, therefore, quite apart from any force to be attached to the word "agricultural," that he does not come within the saving created by section 9 of the Act of 1887.

The appeal must, therefore, be dismissed with costs.

Sir Peter O'Brien, C.J., FITZGIBBON and BARRY, L.JJ., concurred.

FITZGIBBON, L.J.—I think that all the evidence of user from time to time should be looked to, and not merely the evidence of the user at one particular time.—I.L.R., xxxii., 9.

Appeal.
1892.

Daly
v.
Wright.

Walker, C.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., FITZGIBBON and
BARRY, L.JJ.)

Appeal.
July,
1892.

M'Lean v. Mulholland.

*Land Law (Ireland) Acts, 1881, 1887—Town-parks—
Non-agricultural.*

The Sub-Commission (Greer, A.L.C.) dismissed the application, on the grounds that the holding was within the definition of town-parks.

The Land Commission reversed that decision.

Appeal.
July,
1892.

M'Lean
v.
Mulholland.

The holding was situate in Ballynahinch, and was originally 13 Irish acres ; eight of these acres were let to the tenant M'Lean in 1864, at three guineas per acre ; M'Lean being a publican in the town and a cattle-dealer. It also appeared that the landlord had purchased for £100, in 1859, the tenant-right in the particular farm ; and it was contended for the landlord that all the facts connected with the history of the holding showed it to have been included in the lands of the town, which were admittedly town-parks. It was also shown that the tenant had received £52 for drains made in two years ; the rate of compensation, 1s. per perch ; also that the ordinary rent for land in the same estate was £1 5s. per acre.

For the tenant it was shown that the original letting was as for an ordinary agricultural farm ; that the tenant had been promised by the then landlord, the late Mr. D. S. Ker, father of Captain Ker, to give M'Lean the first farm that fell in ; that it had been used by him as an agricultural holding ; and the landlord, by paying £160 for the holding in 1859, got in return an increased rent. It was argued that under section 99 of the Act of 1887, the lands were not town-parks. It was urged in reply that the three guineas rent was a town-park rent.

Their Lordships unanimously reversed the decision of the Land Commission, and dismissed the originating notice with costs.

[Not reported.]

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

Appeal
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(Before WALKER, C., PALLES, C.B., and FITZGIBBON,
L.J.)

Archer v. Caledon.

*Landlord and Tenant—Land Law (Ireland) Act, 1881—
Town-park — “Town” — Accommodation Land—44
& 45 Vict., c. 49, section 58, sub-section 2.*

Whether a place is a town so as to constitute one of the statutory requisites for making a holding in its neighbourhood a “town-park,” depends on whether it can be fairly described in ordinary language as a “town,” and whether there are living in the place people who want land for their own accommodation, and are willing to pay for it more than its ordinary value.

The Sub-Commission fixed a fair rent. The landlord had the case re-heard by the Land Commission, who affirmed the order of the Sub-Commission, holding that Caledon had not a sufficient population to constitute a “town” within section 58, sub-section 2, of the Land Law (Ireland) Act, 1881. The Court of Appeal reversed the decisions.

The holding mentioned in the originating notice contained 4 acres, 3 roods, 17 perches, statute measure, and was situated somewhat less than half-a-mile from Caledon. William Archer, the tenant, bought it in 1883 at a public auction for £60. He lived in Caledon, where he carried on the trade of painter, and where his wife kept a public-house. Archer kept a cow on the holding, and sold milk through Caledon. He had at one time kept a horse and car. The previous tenant

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was Thomas Magill, who got possession of the holding in 1873. He was a saddler living in Caledon ; he kept two cows on the holding, and sold their milk ; he had also cultivated a portion of the holding, using it for corn, potatoes, hay, and grazing. Before Magill's time the holding was in the hands successively of a father and son, John and Charles Wilson. They were general merchants living in Caledon, and the father kept the post-office there ; they used this holding in connection with their house in Caledon. At the date of the hearing in the Court below, the population of Caledon was stated to be 703. In 1881 it was 562. Caledon is a petty sessions town, with a weekly market and a monthly fair, and is one of the stations of the Clogher Valley Railway. It was proved that there was a demand by the shopkeepers in Caledon for the adjoining land, which was accommodation land. The old rent of the holding was £9 ; the Government valuation was £7 10s. The Sub-Commission fixed the fair rent at £7. The report of the Sub-Commission stated that 50 per cent. of this rent was for proximity to Caledon.

Walker C.

WALKER, C.—The Judgment of Mr. Justice Bewley assumes that this holding has every incident of a town-park except one. There must be three incidents attaching to a holding to constitute it a town-park :—(1) occupation by a person living in a town ; (2) increased value as accommodation land over that of a farm by reason of being near that place ; (3) that the place is a town, that is, it must be an assemblage of houses having the general characteristics answering to what one would understand by that term as used in the Act. . . . Mr. Justice Bewley has applied a hard-and-fast rule—the population test—for the purpose of his decision, that Caledon is not a town. He says that as there were only 562 people in Caledon, and now 703, therefore it is not a town, and, therefore, these lands are not town-parks ; and thus, though the lands are in the occupation

of a person living in Caledon, and though they bear an increased value from being near Caledon, and on the evidence there are persons there requiring accommodation lands, as Wilson, Magill, and Archer did, and a sufficient assemblage of persons in Caledon to create that increased value, the incident of a town does not exist. The object of the Legislature in excepting town-parks from the main provisions of the Act of 1881, was to save lands in the vicinity of towns for the accommodation of townsmen who are willing to pay and do pay an increased value for it.

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No doubt, we must have something that will present generally the characteristics of a town. But when we have people living in a town, and requiring and using accommodation land, and paying 50 per cent. more for their land on account of its being near that place, and those people constitute such an assemblage of persons as is sufficient to create that increased value, and there is an assemblage of houses presenting generally the characteristics of a town, I think all the essential definitions of a town-park exist.

I am, therefore, of opinion that the decision of the Land Commission must be reversed.

PALLES, C.B.—I concur in the Judgment of the Lord Chancellor, and in the reasoning by which he has arrived at it.

Palles, C.B.

Unquestionably many years ago there were cases which drew a hard-and-fast line, as to the number of the population which should inhabit an assemblage of buildings which, in ordinary language, would be called a town, in order to constitute such assemblage of buildings a town within the meaning of section 58; and as I read the Judgment of Mr. Justice Bewley, he has determined this case upon that principle.

I was under the impression that since the decision in *Killeen v. Lambert* (1) these cases were no longer dealt with solely according to the population, but that each

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case was determined on its own peculiar circumstances. Here, however, the principle that there must be a certain minimum population has been applied, and I do not think we can reverse the Judgment of Mr. Justice Bewley, without laying down that he was wrong in principle in the mode in which he determined that Caledon was not a town. I am of opinion that the learned Judge was wrong. I think it is impossible, having regard to the 58th section of the Act of Parliament, to draw any such hard-and-fast line. "Town," according to my view, like every other word in the English language, will bear a different signification according to the object with which it finds a place in any particular piece of legislation. We must see whether in this 58th section we can find any mode by which we can with certainty lay down a principle to guide us in determining what is the essence of a town within the meaning of the Act. There are certain statutory exceptions enumerated in the 58th section which are thereby excluded from the provisions of the Act, and I think nearly all of them will be found to be parcels of land, in relation to which there are special circumstances of such a character as to take the tenants of them out of the ordinary class of agricultural and pastoral tenants, for whose benefit the Act was passed. In a number of these exceptions it will be found that these parcels of land are lands which are in the habit of being let for temporary purposes or under exceptional circumstances which negative any presumption that the duration of the tenancy was, according to the intention of the parties, to be indefinite. Now, according to my view of these town-park cases, where there is a demand for such holdings, so long only as the tenants of them are resident in the town, every such holding is held for the peculiar convenience of the tenant, as a townsman, and, for that reason, bears an increased value, above its ordinary value as a farm. Every tenant, of course,

as a rule, takes his land for his own convenience ; but the demand for ordinary farms in the country does not give rise to any fictitious value in land. In such a case there is nothing but the normal value. But the moment you find an exceptional number of persons living in a particular area, who, by reason thereof, have special need of small portions of land for their personal convenience, from that moment, if that demand is greater than the amount of land forthcoming to answer it, the land rises in value.

Now, the whole of the Land Act of 1881 appears to me to deal with land in its normal character of land, having no more than its normal value as land ; and the reason of the exception out of the Act of land of the description I have mentioned is because it bears a peculiar, as distinguished from its normal, value. I, therefore, look upon the fact of land having an increased value as accommodation land as one of the elements which will enable us to render certain what otherwise would be uncertain. If, then, we add to that the fact that the person for whom it bears this increased value as accommodation land is a person who is living in a city or town, it will be seen what is the element which must exist in the town to give to that land its increased value as accommodation land. That element is not that the assemblage of persons within it must be above or below a specified number, but that it must be such as, *in fact*, gives to the surrounding land the increased value I have mentioned.

No doubt, this will throw on the Land Commission the trouble of examining the circumstances of each particular case. I can well understand that in some cases the question will depend, not so much on the population or on the size of the particular town, as on its shape. Take the case of a long, straggling town, consisting of one street nearly a mile in length, with occasional gaps in the lines of houses, and with large

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quantities of land at the rear of the houses on each side of the street. I can understand that, although in such a case land would be required for the accommodation of the persons living in the town, the supply of land for that purpose might be so ample as not to raise its value as a farm.

The test of land bearing an increased value as accommodation land was years ago pointed out in the Judgment of Baron Fitzgerald in *Christy v. Gordon* (1) as the true test for ascertaining whether lands are town-parks; and I am glad to take part in bringing back the ground of decision to the rule that was laid down by that distinguished Judge. I cannot help thinking that this is the clearest and most essential element to be sought for when considering whether any particular lands come within this statutory exception. Therefore, my opinion is that where there is a subject-matter which answers the description of "town" in its ordinary sense, and the assemblage of houses constituting that town is of such a character that it increases the value of the lands near to or adjoining it, because of their being used as accommodation land by persons residing within the town, the moment that that increased value arises, the land becomes a town-park within the meaning of section 58; although for some other purpose the assemblage of houses might be called a village.

FitzGibbon, L.J., concurred.—I.R., 1894, vol. ii., 473.

SUB-COMMISSION.

Sub-Com.
June,
1893.

(Before GREER, A.L.C.)

Gillespie v. the Earl of Erne.

*Land Law (Ireland) Act—Conacre—Town-parks—
“ Ordinary agricultural holding ”—s. 9 (1887).*

In this case there were two holdings. The facts appear from the Judgment.

GREER, A.L.C.—In the first case the area is 2 acres, 2 roods ; the rent, £3. This holding is close to the county town of Lifford. It was formerly in the occupation of the husband of the tenant, who was surgeon of the Lifford Infirmary, and lived in the town. Upon the evidence it appears that the tenant was in the habit of conacreing the land, and that she got from £3 10s. to £4 per Cunningham acre for it. Mrs. Gillespie lives in Lifford. In the other case the area is 6 acres, 1 rood, 16 perches, and the rent is £14 1s. The holding is also in the immediate neighbourhood of Lifford, and was formerly held by a Doctor Greer, who resided in the town, and was the dispensary doctor of the district. These lands are also conacred by the tenant at from £3 10s. to £6 the Cunningham acre. In neither of these cases was any evidence laid before the Court as to the nature of the original letting ; but having regard to the position and professional appointments held by the two former tenants, the extent of the holdings, their proximity to the town of Lifford, and the high rents paid for them, I must assume that they were not let as ordinary agricultural holdings. They may recently have been used as such, but that would not be sufficient to bring them within section 9 of the Act of 1887.

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They must not only be used as ordinary agricultural farms, but they must have been let as such. The onus of proof upon that point is upon the tenant. She has not discharged that onus, and I, therefore, dismiss both these applications.—I.L.T.R., vol. xxvii., 309.

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COURT OF APPEAL.

(Before WALKER, C., FITZGIBBON and BARRY, L.JJ.)

Perry v. Goodbody.

Onus of proof of enhanced value on landlord—Accommodation lands must be of the character of town-parks to be excluded from the Acts, not lands that were generally used for accommodation purposes—Proximity value defined.

Sub-Commission (Doyle, A.L.C.) fixed a fair rent. Land Commission affirmed. Court of Appeal affirmed.

Wall v. Eyre referred to.

Walker, C.

WALKER, C., said if the Court below had dismissed the originating notice, he would probably have given his voice, as far as he was concerned, to the affirming of their decision. Now, as regarded the subject of the demise, it was said that it was within the case of *Wall v. Eyre*. But here they had to consider a holding, which holding involved, or might involve, for its better use, rights of way, and rights of water, and rights of pasture, and numerous other easements or *profits à prendre*, rights that might arise from grant or prescription, and once created might pass under the word "appurtenances."

The whole case had been absolutely ruled upon by the case *in re Hutchinson*. Mr. Campbell properly said that his strong point was town-park, and certainly this case was rather near the border-line. The onus was on the landlord, and they had to see whether the landlord had discharged the onus of showing that this was accommodation land in what he (the Chancellor) considered to be the true sense of the term. He thought, therefore, the question in this case was reduced to one simply of fact, and the onus was on the landlord, though, of course, it would be shifted if the question depended on section 9 of the Act of 1887. There were several circumstances in this case in themselves inconsistent with its being accommodation land, which went to help the tenant. In the first place, the length of time it had been in the Perry family, and the brewery, the renewal of these leases, the use to which it had been put—feeding cattle and meadowing—in fact, that they were large farmers in the immediate vicinity, and that a portion of their business was that of farming. The extent of the holding was a very important element, although he was not inclined to attach absolutely so much value to it as perhaps Mr. Justice Bewley did in his Judgment, because it might very well be that the absorption into one take of what might very well have satisfied the accommodation needs of several towns-people would not determine the matter. Against these circumstances, no doubt, they had several in favour of the landlord, but they were not conclusive, namely, the locality, the mode of access to this place, the motive for which it was taken as an adjunct to the brewery, and the high rent paid. Then, also, Mr. Campbell strongly relied on the fact that a portion of the premises was devoted to a coal and corn store and gardens for the manager. These constituted strong reasons for desiring to hold it and pay a very high rent for it. The evidence of Mr. Walpole was the main difficulty in the

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case on the part of the tenant, and it was designed to prove what was wanted. He was a very skilled witness on this point, and by long experience knew the point which was desired to be elicited, as well as the astute counsel who was examining him; and he certainly appeared to have had every opportunity of having the point indicated; he was brought up over and over again by Mr. Campbell to this stile; but he never appeared to have taken the jump. He (the Lord Chancellor) did not think the landlord had established, in a case where they had to consider whether they were going to over-rule two Courts below, a competitive value amongst the shopkeepers, the residents of Rathdowney, and the need for it in that class, leading to a mischief which would arise from the withdrawal of this farm from the area of accommodation land. He thought the appeal must be refused.

FitzGibbon,
L.J.

FITZGIBBON, L.J., in concurring, said—In the present case the onus lay on the landlord of showing that this holding was excluded from the Act, and, in his opinion, that it was not excluded was supported by sufficient evidence, and there was not such a preponderance of evidence against it, or even, he would say, a preponderance of evidence at all, as would justify the Court in coming to a contrary conclusion. As to the point about the field, in which there was a *profit à prendre*, he thought that was analogous to cases in which rights of turbary and rights of grazing were annexed to holdings, and was not analogous to *Wall v. Eyre*, in which there was a separate demise of a subject-matter which was not within the Act at all. As regarded the town-park point, the words “ordinarily termed town-parks” were explanatory words only, and explanatory of the words that followed “accommodation land,” and it was accommodation lands of the character of town-parks that were excluded from the Act, and not lands generally that were used for accommodation purposes. When they spoke of increased

value, there was also a definition to be borne in mind—proximity value, as it was often called—namely, an increased value derived from the fact that any particular holding was near a town would unquestionably include increased value as accommodation land for town-parks or for any other purpose; but it would not embrace the whole of it. Proximity value in the strictest agricultural sense, as distinguished from the town-park sense, would arise in every case where land was so near a town as either to produce an increased price for its produce, by reason of having a convenient or high market, or the cases in which the cultivation of the land would be more profitable by reason of there being in the neighbourhood supplies of manure and facilities for cultivation, and matters of that kind. Proximity value of that kind not only was not accommodation value derived from the use or possibility of use of the holding as accommodation land, but was strictly derived from the increased value of the produce itself where that produce was of an agricultural kind or an increased value from facility of cultivation where the cultivation was strictly agricultural. The increased value as accommodation land arose from increased demand for land of that character for the purpose of being used by townspeople in connection with their residences or their businesses that were carried on in the town, and unless the increased value was, therefore, referable to an accommodation of what he would call an urban character by and for a townsman, it was not the increased value of land ordinarily termed town-parks, and was not an increased value that would exclude the land from the operation of the Land Acts. In this case he was satisfied that this land had increased proximity value in an agricultural sense; but he was not satisfied that it had increased value as accommodation land by reason of its belonging to a class of land ordinarily termed town-parks. . . . He thought the point made by the

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Appeal. Commissioners of the size of this holding was an entirely misleading one; but when he looked at the map and the circumstances, and remembered that the onus was on the landlord in the case, he thought that the size of the holding was by no means immaterial. He had come to the conclusion that they could not disturb the conclusion at which the Land Commission had arrived. It was not to be understood that any big holding would escape from being town-parks in this Court because it was big. It might be all the worse on that account as far as he was concerned, because he did think that one person managing to engross a large tract of town-parks, or even managing to engross a large tract of land of which a substantial part would be town-parks, would be even more out of the purview of the Act as an agricultural tenant than some person who had only got a small farm, and was using it as such, which was within the town-park zone.

Barry, L.J., concurred. The appeal was dismissed.

SUPREME COURT OF JUDICATURE.

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Appeal.
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(Before WALKER, C., PORTER, M.R., and FITZGIBBON
and BARRY, L.JJ.)

M'Cann v. Downshire.

*Land Act, 1881, s. 58—Town-park—Accommodation land
—Onus of proof—Evidence of increased value.*

In 1855 the landlord, in consideration of M.'s agreeing to build a house in "the town of Dundrum," agreed to demise to M., as soon as the house was built, the plot whereon it stood for a term of three lives or ninety-nine years, and also a plot of 7 acres "as a town-park," to

be allotted to M., and to be held with the house at a rent of 30s. an acre for a term of thirty-one years. M. built the house, and thereupon, in January, 1860, the landlord executed to him a lease of the premises in Dundrum, to hold for the term agreed upon; and in June, 1860, the landlord executed a lease demising to M. 7 acres and 35 perches, situated about half-a-mile from Dundrum, for the term and at the rent agreed upon. This latter was an ordinary agricultural lease, and on its expiration M.'s widow, who had succeeded M. as tenant, continued to hold on as tenant from year to year. At the date of the agreement M. did not live in Dundrum; but he subsequently came to reside there, and till his death carried on the business of publican in that place. His widow continued to live in Dundrum, and kept on his business. She served an originating notice to fix a fair rent of the 7 acres.

The landlord offered no evidence that the holding bore an increased value as accommodation land, over and above its ordinary letting value as a farm, save a general statement to that effect by his agent.

The Sub-Commission (Bailey, A.L.C.) fixed a fair rent.

The Land Commission dismissed the originating notice.

Held (reversing the decision of the Land Commission), that the onus of proving that the holding bore an increased value as accommodation land over and above its ordinary letting value as farm, lay upon the landlord, and that as this onus was not discharged, the holding, which was an agricultural holding, was not excepted from the Land Act of 1881.

Archer v. Caledon (I.R., vol. ii., 1894, 473) explained.

Boyle v. Foster (30 L.R.I., 623) distinguished.

WALKER, C.—The holding in this case contains 7 acres and 35 perches. The rent is £11 2s., and the valuation £8 15s. Mr. Justice Bewley decided against

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the tenant on the ground that the holding was a town-park. This involved that the holding bore an increased value as accommodation land over and above its ordinary letting value as a farm. As I dissent on that point from the view of Mr. Justice Bewley, it might be sufficient for my Judgment. But inasmuch as upon another point in the case he founds his Judgment on a view he took of the decision of this Court in *Archer v. Caledon* (4), I think it necessary to call attention to our decision, and the view, as reported (28 I.L.T.R., 58), which he took of that decision. He says:—

“But the recent decision of the Court of Appeal in *Archer v. Caledon* (4) laid down that the distinction hitherto taken between town and village was inadmissible, and that if the demand for accommodation land existed, and such land bore an increased value for accommodation over and above its ordinary letting value, it was immaterial whether the town was called in ordinary language a town or a village.”

So far as I am concerned I took special pains to state that there must exist in every case that which has the characteristics of a town. There is no definition of a town, and, therefore, its existence must be gathered in each case from the facts, into which population must enter, but no arbitrary number of inhabitants.

I said:—“No doubt, we must have something that will present generally the characteristics of a town. But when we have people living in a town, and requiring and using accommodation land, and paying 50 per cent. more for their land on account of its being near that place, and those people constitute such an assemblage of persons as is sufficient to create that increased value, and there is an assemblage of houses presenting generally the characteristics of a town, I think all the essential definitions of town-parks exist.”

Before us two questions were argued—1. That the holding was not agricultural or pastoral, but residential,

and it was presented in this way—The agreement of the 16th of May, 1855, provides for a letting of the site for a house to be built, and also for a letting of 7 acres of land as a town-park to be held with the house, and, therefore, that the house and the land (which was the adjunct) are grouped together, and the element of house overshadows the attached element of land. But this argument ignores the definition of “holding” given in the Act, which is as follows:—“‘Holding’ during the continuance of a tenancy means a parcel of land held by a tenant of a landlord for the same term and under the same contract of tenancy, and upon the determination of such tenancy, means the same parcel of land discharged from the tenancy.” Again: “‘Tenant’ means a person occupying land under a contract of tenancy.” But the holding of 7 acres does not spring by contrast out of the agreement of 1855. That agreement could not be specifically performed. It is the lease of June, 1860, which made this piece of land a “holding.” The house in Dundrum, the land outside Dundrum, are held for terms widely different. The second question, then, is—Is it a town-park? I agree that the agreement of 1855 carries the landlord a considerable way. It adopts the term “town” and “town-park.” It is a printed agreement. But, of course, all town-parks are not excluded from the Act of 1881. The town-parks excluded are those which have certain incidents. 1. They must be in the occupation of a person living in a city or town; 2. They must bear an increased value as accommodation land over and above the ordinary value of land occupied as a farm. The origin of the tenancy is of importance, and it is repugnant to the idea of accommodation land. There was evidently a desire to encourage building in Dundrum, and as an aid to give a piece of land when the house was built. The landlord fixes the rent of land, and is master of the position. It is very unlike the

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case of a townsman located in a town competing for a bit of land for the accommodation of his dwelling, and giving an enhanced price accordingly. But the case is wholly wanting in evidence that there was an increased value as accommodation land. There is nothing to show that 30s. an acre was more than the ordinary rent of an ordinary farm. There is no evidence that other persons held accommodation land, or that this or any other plot was ever in the hands of townsmen having and requiring accommodation. On the contrary, the landlord had 20 or 30 acres idle on his hands which he did not wish to let, so that it would appear that the supply exceeded the demand. The evidence of the agent, given generally in answer to leading questions, was wholly insufficient to discharge the onus cast on the landlord. Accommodation is a term of large import. It is said that there is 10 per cent. value for proximity, and that this must be accommodation value. I wholly deny that. No doubt, there can be no accommodation value without including proximity; but the converse is not true. In some cases the figures of rent and value may be almost conclusive evidence that the land bears accommodation value. So that the 50 per cent. in the Caledon case (1) might go far towards that result. The existence of the railway station and the wharf is an ample basis for the proximity value of 10 per cent.

The valuation of this holding is £8 15s., and the yearly rent is £11 2s., on an acreage of 7 acres and 35 perches. The rent and the valuation by no means stand out in startling contrast, and they wholly fail *per se* to suggest competitive value. They suggest that the rent of the land may be something higher by reason of being near a station and port of export. There is no evidence of the existence of any class of townsmen who had ever got land for accommodation, or who wanted it now. Therefore, I think the onus was not satisfied.

Savage's case, which was argued after *M'Cann's case*, seems to me to present features which are all common to *M'Cann's case*. The Sub-Commission, having the agreement of 2nd January, 1855, before them, held that the holding was not agricultural or pastoral. The decision of the Chief Commissioners was based upon a different ground—namely, that it was a town-park. I have already in *M'Cann's case* given my reasons for holding that this view taken by the Sub-Commission cannot be sustained. It follows that *Savage's case* stands on the same footing as *M'Cann's case*. The order of the Land Commission in both must be discharged, and also that of the Sub-Commission in *Savage's case*, and the cases remitted to be dealt with as justice shall require. The tenant in each case must have the costs here and before the Chief Commission.

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PORTER, M.R.—I am of the same opinion, and I should add nothing, except that we are differing from the opinion of the Land Commission, who held, reversing the decision of the Sub-Commission, that *M'Cann* was not entitled to have a fair rent fixed, on the ground that the holding was a town-park within the meaning of the Act. It is right, therefore, that I should state in my own words my reason for coming to the conclusion at which I have arrived.

Porter, M.R.

In *Savage's case* the Sub-Commission refused to fix a fair rent, the agreement being before them in that case, while, owing to a defect in its stamping, the agreement was not admitted in evidence in *M'Cann's case*. Probably if the agreement had been made evidence in the latter case before the Sub-Commission, their decision would have been different. We have got the whole case now before us, and we have to determine whether any of the contentions presented on the part of the landlord have been sustained.

The decision of the Land Commission in both cases proceeds upon the ground that the holdings were town-

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parks. That is not the ground which was mainly argued before us. I will deal first with *M'Cann's case*. It was mainly pressed upon us that this holding was neither agricultural nor pastoral, and so not within the Act at all. The argument upon this point was not based upon the mode of user or the character of the letting of the particular holding taken by itself. It could not be so based, having regard to the lease of June, 1860, and to the fact that the 7 acres were used and cultivated as an ordinary farm. But it was contended that, in view of the agreement of 1885, *M'Cann's* holding of 7 acres was to be treated as an adjunct to his town holding, and that for the purposes of the Land Act it must be dealt with as if *M'Cann* had but one holding; and that, inasmuch as a large portion of that one holding consisted of a town-letting admittedly outside the Act, the entire subject-matter must be excluded as not being an agricultural or pastoral holding within the meaning of the Act. The only cases upon this branch of the argument which were relied on were the familiar ones of residential holdings and mill-holdings; in each of these, however, where it was held that the holding was not agricultural or pastoral within the meaning of the Act, the holding was one; and the reason of the decision was that where a large or substantial portion of the holding was not agricultural or pastoral, the entire holding was not agricultural or pastoral within the meaning of the Act. But none of these cases appears to me to have the smallest bearing upon that which is before us; because, though the motive on the part of Lord Downshire in granting the lease of 1860, and of the tenant in accepting it, was the contract to give and accept, along with the demise of a house and buildings in Dundrum, these previously unascertained 7 acres, at a rent of 30 shillings an acre, yet the moment the seal was put to the lease of 1860, it became the lease of a separate holding, held by a different contract of tenancy,

and legally unconnected with the holding in Dundrum. The formal demise of the town holding was carried out by a totally different instrument, of a different date, and for a widely different term. The cases that have been cited are no authority for the proposition that M'Cann is to be deprived of his right to fix a fair rent of these 7 acres by reason of his having under a different contract a separate holding which is neither agricultural nor pastoral.

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The Land Commission decided the case upon the ground that the 7 acres were a "town-park" within the meaning of the 58th section, and this view must be also dealt with. The agreement of 1855, which led to the leases of 1860, describes Dundrum as a "town," and the holding subsequently to be demised outside the town as a "town-park." The lease of June, 1860, does not so emphatically use these expressions; but I do not think that affects the question. By contract or arrangement between the parties—so far as that can affect the matter—Dundrum has been regarded as a "town," and the holding in its vicinity as a "town-park." Therefore, if the question were whether, apart from the Land Act, this was a "town-park," I think the decision of the Land Commission was right, and there is abundant material for supporting it. That, however, is not the question, because the Act of 1881 does not apply to every town-park. Passing by the thorny question as to what the definition of a town is, and assuming for the purposes of this case, and as between the parties to the agreement of 1855, that Dundrum is to be treated as a "town," assuming that this land, by the agreement of the parties, is to be deemed a "town-park," the question still remains whether it is such a town-park as is excluded from the operation of the Land Acts. That question depends on the terms of the 58th section of the Act of 1881, which excludes, not every town-park, but "any holding ordinarily termed

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'town-parks,' adjoining or near to any city or town, which bears an increased value as accommodation land over and above the ordinary letting value of land occupied as a farm, and is in the occupation of a person living in such city or town, or the suburbs thereof." Now, I may pass over the last words of this definition as unimportant for the present case, only remarking that they emphasize the view that it was not intended to exclude from the Act everything known as "town-parks." The important point in reference to the present case is whether it has been shown that this holding bears an increased value "as accommodation land over and above the ordinary letting value of land occupied as a farm." In my opinion there was no real evidence in the case to sustain such a conclusion. No doubt, there were general answers to leading questions which were put to Mr. Howe, the landlord's agent, as to whether or not there was a demand for accommodation land near Dundrum, and so forth. But the question which we have to determine is: Does this holding bear an increased value as accommodation land *over and above its ordinary letting value as a farm*. Now, in considering what would be the ordinary letting value of land such as this is, to be used as a farm, the meaning, of course, must be the letting value of similar land in the actual position and situation in which this land is; that is, land with the necessary advantage of its proximity to a town, if there be a town, to a market, if there be a market. It is not the question whether it bears additional value over and above what it would bear in a situation miles away from the town; but whether, being in actual propinquity to the town, it bears, as accommodation land to be used for the benefit of the people living in the town, a value greater than an ordinary farm in the same position, not occupied as accommodation land. That is, whether persons living in the town would, by reason of their town residence,

be willing to give a larger rent than, say, a farmer immediately adjoining the holding, but not residing in the town, and not desiring to use it as accommodation land in connection with a town holding. There is no evidence that such a circumstance exists in this case. No question was put as to what farmers living outside Dundrum would be willing to give for this piece of land separately, or as an addition to their other holdings, if any. That is an essential element, which must be proved or arrived at as a natural inference from some trustworthy and sufficient evidence, before the benefit of the Land Act can be withheld from a person who would otherwise be entitled to it. I am, therefore, of opinion that there has been a defect of proof in this case; and that defect of proof is not supplied by the rent of 30s. an acre fixed in 1855—a rent which does not at all startle me by its amount.

I am of opinion, therefore, that the decision of the Land Commission was wrong in *M'Cann's case*. Exactly the same considerations apply to *Savage's case*, which only differs in this, that the rent under the old agreement was left to be settled subsequently, instead of being fixed by the original arrangement at 30s. an acre; and the rate at which it was so settled by agreement is not very different from, though somewhat below, the rate at which M'Cann's rent was fixed beforehand.

FITZGIBBON, L.J., in concurring said:—He was one of the Judges who had decided *Caledon v. Archer*, upon the authority of which this case had been decided by the Land Commission. He hoped it was now clearly understood, from the Judgments that had already been delivered, that this case was decided in this Court upon the simple, clear, and complete proposition that the onus rested upon the landlord, in the case of a town-park, to give evidence that a particular holding bore an increased value as accommodation land, over and above the ordinary letting value of land occupied as a farm.

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In this case there was no tangible or sufficient evidence to discharge that onus, and, therefore, the holding, being an agricultural or pastoral holding, it was not within the exception, and it was within the Act.

BARRY, L.J., in also concurring said, that though he did not take part in the Judgment in the case of *Archer v. Caledon*, yet, having heard that decision, he should confess his astonishment at the views he had heard of that decision as stated as having been given as the Judgment of the Court.

Judgment was accordingly given upholding the appeal by the tenant with costs.—L.R.I., vol. ii., 1894, 611.

Land Com.
December 24,
1896.

LAND COMMISSION.

(Before ROSS, J., and FITZGERALD, Q.C., Commissr.)

Mahony v. Hibernian Marine Society and others.

Ross, J.

ROSS, J.—These two cases have been heard together. By deeds bearing date 22nd October, 1866, the Hibernian Marine Society granted in fee-farm these holdings to Edward L. Jameson, Esq., described as of the Hermitage, Carlow. Mr. Jameson was the Sub-Sheriff of the County Carlow, and was Clerk of the Carlow Union. We are satisfied that the Hermitage where he lived is in the suburbs of Carlow. The lands in question are within a mile of the town. Part of the produce of these lands was used at Mr. Jameson's residence; whatever was over was sold in the Carlow market. We are satisfied that the lands bear an increased value by reason of the propinquity of this considerable town, and the number of persons in it to whom land of this character and in this situation would be of value to an extent

much exceeding its value for farming purposes. We have here, therefore, the three statutory requisites required by the Act of 1881 to constitute a town-park. It lies in the tenant to bring himself under section 9 of the Act of 1887. Mr. Jameson died in 1894; the present owner bought his interest for £74. Since then it appears he has used the land as an ordinary agricultural farm. But was it originally let as an ordinary agricultural farm? The onus of proving this is on the tenant. He has not merely failed to do so, but I am convinced that no such intention was present to the minds of the grantor and grantee. My only difficulty in the case is that it does not accord with my general notion of a town-park that it should be held under a fee-farm grant. There is, however, nothing in the Acts to support this view, and I am informed that the Land Commission have decided holdings to be town-parks that are held for long terms of years. The decision of the Sub-Commission will, therefore, be affirmed.

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SUB-COMMISSION.

(Before TRENCH, Q.C., A.L.C.)

Sub-Com.
January,
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Ager v. Sealy.

Meaning of "true value"—Land Law (Ireland) Act, 1881, sec. 1, sub-sec. 3.

Held, that the meaning of the "true value" is what a thoroughly solvent and prudent man would give for the holding, intending to make the rent out of it, and a fair profit besides on his capital.

TRENCH, Q.C., A.L.C.—This case was heard at Kilarney. The area of the holding is 37 acres, 1 rood, 28 perches, and the rent is £17. This rent is a judicial

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rent fixed by a Sub-Commission, and this is a matter of some importance. It was contended on behalf of the tenant that the "true value" is the best price that can be got. On the other hand, it was contended on behalf of the landlord that the "true value" is the sum which the tenant would be entitled to receive under the Act of 1870 for his improvements if he were quitting his holding. Each party relied upon the case of *Adams v. Dunseath* (16 I.L.T.R., 59; 10 L.R.I., 109), and the dicta of some of the Judges who heard it. The question was discussed in that case by some only of the Judges, but was not decided. That case was succeeded by the case of *The Marquis of Headfort's Estate*. Now, this case is only reported in MacDevitt's Reports, p. 328; it is not reported in any authorized report; it does not purport on the face of it to have been reported by a Barrister; and it is manifestly very meagre. I do not, therefore, feel myself bound to follow it. Mr. Cherry puts the interpretation upon that case that the "true value is almost equivalent to the compensation for improvements to which a tenant is entitled on quitting his holding under the Act of 1870." If so, I shall, I think, show hereafter that *Headfort's Estate* has not been followed in subsequent cases. I cannot adopt either of the views put forward—neither that laid down by Law, C. (p. 125), and Sullivan, M.R. (p. 143), nor that of O'Hagan, J., if they intended to say that the "true value" of a tenancy is only what the tenant would get for his improvements under the Act of 1870. First, is it the best price that can be got? I wish to point out at the outset that this very section 1 makes use of the phrase, "the best price that can be got." Is it conceivable that the Legislature could without design have substituted for it the words "true value" in sub-section 3. Again, the holding may adjoin or dove-tail into the farm of an intended purchaser. There may be water or turbary upon it in which his own farm is deficient, and for these reasons he may

be willing to give much more for it than any other man would.

Take this case: A has a valuable harness horse; B has its exact match. A may be willing to give B a great deal more for his horse than anyone else would. The same thing would apply to a deficient set of rare old china, and to several other things. Would the outside public say that the "true value" was given? On the contrary, they would say that a great deal more than the "true value" was given, but that the purchaser wanted the articles for a special reason. For these reasons I am of opinion that the "true value" is not the best price that can be got. Is it, then, secondly the value of the tenant's improvements? Here again, I refer in the first instance to the sub-section itself. It does not say that, in the event of disagreement, the sum is to be ascertained to which the tenant would be entitled as compensation for improvements under the Act of 1870, on quitting his holding. I cannot think that this is the result of bungling legislation. The Legislature must have had the Act of 1870 before them. It is referred to in the Act of 1881, and its phraseology frequently adopted. Again, it may not be exactly a legal argument; but we cannot shut our ears to contemporaneous history; and we heard much during the discussion upon this Act of the three Fs—Fair Rent, Fixity of Tenure, and Free Sale.

Now, every tenant has at Common Law, in the absence of contract to the contrary, a right to sell for the best price he can get. This section 1 applies as well to tenants who have not as to tenants who have taken the benefit of the Act. Did, then, the Legislature intend to cut down their Common Law right to this enormous extent? I cannot think that it did. Again, in a case of this kind it was proved before me that there were no tenant's improvements. Why? Because the farm was so good that it required none. It was logically argued

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that the "true value" was, therefore, nothing. There would, moreover, be this further anomaly, that in the hands of an improving tenant the worse the farm the greater its "true value;" because, of course, the improvements would be more numerous. I cannot believe that the Legislature intended anomalies such as these. There are a few cases decided by Sub-Commissions that I wish to refer to:—*Connor v. Gentleman*, 18 I.L.T.R., 28; *Enniskillen v. Willis*, 19 I.L.T.R., 25; *Lloyd v. Irwin*, 16 I.L.T.R., 126. By the absence from those cases of any allusion to what the tenant would be entitled to under the Act of 1870 for his improvements, and, from the amounts fixed as the "true value" of the tenancies, I am led to believe that those Sub-Commissions did not go solely upon the value of the tenant's improvements. They quote, no doubt, the expression of Sir E. Sullivan, M.R., that the "true value" is what, "having regard to the interest of landlord and tenant respectively under this code, would be the true estimate of price between them." But that phrase is somewhat vague. These Sub-Commissions seem to have acted on the principle that it meant something else, and more than the value of the tenant's improvements. If it does, and if I am not right in my own view, I do not know what it means, and I could give no intelligent instructions to my colleagues, nor do I think that from the use of that phrase alone a Court of Appeal could determine, with any degree of certainty, upon what principle a Sub-Commission had really acted. I desire to be plain and clear; if I am wrong, I can be set right by the proper tribunal. My definition of the "true value" is what a thoroughly solvent and prudent man would give for the holding, intending to make the rent out of it, and a fair profit besides on his capital expended. The "true value" of a thing is what any man wanting an article of the kind would give for it—not what one man would give for this particular article because he wants it for a special reason.

In this case, as I said at the outset, a fair rent has been fixed. We must assume that the landlord's interests were fully taken into account. Every pound added to the rent by reason of the landlord's interest or part interest in the improvements, has diminished the selling value of the tenancy. In this way I think that under my definition the landlord's rights are fully protected. Indeed, the view I have been discussing would appear to me to take the landlord's interest into account twice over: first, in fixing a fair rent, and again, in ascertaining the "true value." When the case comes before me as to how the "true value" is to be ascertained where no fair rent has been fixed, I shall decide it to the best of my ability. The difficulty may be greater in carrying out my views, but, in my opinion, by no means insurmountable. Upon the principle which I have laid down, I and my colleagues have arrived at the sum of £175 as the "true value" of this tenancy. I may add, in my opinion, we are taking into account "the interest of the landlord and tenant respectively."—I.L.R., 1893, p. 63.

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SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before LORD ASHBOURNE, C., and FITZGIBBON,
BARRY, and WALKER, L.JJ.)

Appeal.
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Curneen v. Tottenham.

Landlord and tenant—Notice by tenant of intention to sell tenancy—Election by landlord to purchase—True value—Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), section 1 (3).

The true value of a tenancy within the meaning of section 1, sub-section 3, of the Land Law (Ireland) Act,

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1881 (44 & 45 *Vict.*, c. 49), is not restricted to the value of the improvements on the holding made by the tenant or his predecessors in title, for which he has not been paid or compensated by the landlord. The principles expressed by *Mr. Trench, Q.C.*, in *Ager v. Sealy*, ante (27 *Irish Law Times*, 63), approved and adopted.

Case stated by the Land Commission.

The holding contained 22 statute acres, and was held under a tenancy from year to year at a judicial rent of £4 15s., which was fixed in 1884. The tenant having served notice on his landlord of his intention to sell the tenancy, the landlord claimed to exercise the right of pre-emption given to him by section 1 of the Land Law Act, 1881, and having disagreed with the tenant as to the price, served an originating notice to have the true value of the tenancy ascertained by the Land Commission. The Sub-Commission (*Greer, A.L.C.*) before whom the case came for hearing, by an order dated the 24th July, 1895, fixed the true value at the sum of £30. The landlord having served notice for a re-hearing, the case was re-heard before the Land Commission at Enniskillen on the 24th October, 1895; there was no appearance for the tenant, who had gone to America.

The holding was a mountain holding, used only for grazing, and the tenant did not reside on the holding; there were no buildings on it, and no improvements had been made by the tenant or his predecessors in title. The landlord contended that the true value of a tenancy within the meaning of the 1st section of the Land Law Act, 1881, was to be measured by the value of the tenant's improvements, for which he had not been paid or otherwise compensated by the landlord; and as no such improvements were shown to exist in this case, it was urged that the true value should be fixed at a nominal or small sum. The Land Commission being of opinion that what the tenant was selling, and the landlord was buying, was not merely the tenant's interest in

any improvements made by him or his predecessors in title, but the tenancy itself, with all such rights as are given to the tenant of a present tenancy by the Land Act of 1870, and the Land Law Act, 1881 (1), confirmed the true value at £30. On the application of the landlord they stated a case for the decision of the Court of Appeal, and the question was :—

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Is the true value of a tenancy within the meaning of the 1st section of the Land Law Act, 1881, restricted to the value of the improvements on a holding made by the tenants or his predecessors in title for which he has not been paid or otherwise compensated by the landlord or his predecessors in title?

LORD ASHBOURNE, C.—This is a case stated by the Land Commission, in which the following question is submitted for our decision :—Is the true value of a tenancy within the meaning of the 1st section of the Land Law (Ireland) Act, 1881, restricted to the value of the improvements on a holding made by the tenant or his predecessor in title for which he has not been paid or otherwise compensated by the landlord or his predecessors in title?

As we have heard from the concluding words of Mr. Meredith, the reason why the Land Commission stated the case was because the question was never raised before; and as the seriousness of it was pressed by counsel, they deemed it right not to refuse to state a case. The facts are simple, and lie in a narrow compass; the holding is one of 22 acres, at a rent of £4 15s., and a fair rent was fixed in 1884. The tenant served notice of intention to sell the tenancy, and the landlord served notice of his intention to exercise his right of pre-emption, and, having disagreed with the tenant as to the price, served an originating notice to have the true value of the tenancy ascertained. The case came before the Sub-Commission, who fixed the true value at the sum of £30. The landlord, considering this sum

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excessive, appealed, and the case was heard before the Land Commission, who affirmed the order of the Sub-Commission. The argument addressed to them was substantially the same as that which we have heard. We have nothing whatever to say to the smallness of the case, or whether a reasonable figure was measured. We have only to answer the narrow question on the construction of sub-section 3 of section 1 of the Act of 1881. When the case was heard before the Land Commission, and before us, there was no appearance for the tenant, who, it is stated, has gone to America. It is of no importance whether he is in Ireland or America; he may have been advised that he would leave the case to its own merits. We have had the benefit of listening to the argument of the landlord's counsel, who would ably present any argument on any question entrusted to them. Of course, they cannot perform impossibilities; but all they can do is to try to answer the difficulties in the way of argument. What is the 1st section? "The tenant for the time being of every holding may sell his tenancy for the best price to be got for the same." The section says "the tenant" may sell without qualification, and then follow conditions under which this right is to be exercised: "On receiving such notice, the landlord may purchase the tenancy for such sum as may be agreed upon, or, in the event of disagreement, may be ascertained by the Court to be the true value thereof." Upon that the contention is raised that where no improvements have been made by the tenant the landlord is entitled to exercise his right of pre-emption, and go into possession paying nothing, because the tenant is entitled only to a sum equivalent to the true value of the improvements. There is no scope for the Court. The one question, it is urged, for the landlord when he is serving the pre-emption notice is: Has the tenant made any improvements? If the answer is "yes," then what is the value of improvements? and if that is fixed, that is

the amount. But if he has made no improvements, or done nothing to make the holding valuable, there is no price to be paid by the landlord. If it is a pigsty, or some small thing which the tenant has erected, the landlord may enter on paying the value of the pigsty. But the claim of the tenant is subject also to this qualification, which Mr. Cherry admitted, that, if the improvement is not suitable to the holding, the landlord would be entitled to claim the improvement without paying anything for it, even if it were a mansion-house. If the improvement was unsuitable to the holding, it might be ignored, no matter how valuable, and the landlord might enter for nothing. These are grave contentions, but they have never been urged during the fifteen years that the Act has been in existence, although the different provisions of the statute have been keenly discussed and argued by the most powerful intellects in the profession. It would be certainly strange that where we find at the commencement of section 1 that every tenant can sell for the best price that can be got, we should be asked to find, in a few lines lower down, that the statute intended to provide that if there were no improvements, then the price would be nothing.

Suppose there was a grazing holding, where, from the nature of the holding, there might be no improvements without any neglect on the part of the tenant, is the landlord to be entitled to acquire that for nothing? If that is the construction of the Act of Parliament, the draftsman of the Act has been very unhappy in stating the meaning, because the Act might have been drafted in a totally different way, and plainly said that if no improvements were made, the landlord might go into possession by paying nothing. Of course, it may well be said that no blot is a blot till it is hit; but it is startling that it has never before been suggested. I am told that that statement is subject to modification, and that O'Hagan, J., had considered this question in the

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case of the *Marquis of Headfort's estate* (1). Anyone who read his Judgment would be surprised that that argument has been suggested for it, and the Judgment I have just heard read, delivered by Bewley, J., in the Court below, has quite displaced it. Mr. Justice Bewley states that he examined the files of the proceedings in that case, and found that the Land Commission fixed the specified value at a sum not depending directly on the value of the tenant's improvements. The only case that can be held to be a case where the topic was brought forward in its simplicity is the case of *Ager v. Sealy* (2), reported in the miscellaneous part of the Law Times Reports for 1893, p. 63 (see report, p. 505, *ante*). It was decided by Mr. Trench, Q.C., the legal Sub-Commissioner, a very able lawyer, who delivered a very careful and well-expressed Judgment. This question was raised before him, and was entirely displaced by his answer. It does not appear that this contention was ever seriously raised before as a matter of serious argument or contention, save on this one occasion. It next came before the Land Commission in the present case, and they came to the conclusion that the contention was untenable. So far as I can gather from the closing words of his Judgment, the novelty of it occurred to Bewley, J. The question was reserved for the Court of Appeal on that ground. We have heard it argued, and we have no doubt as to the answer we should give to it, and that is in the negative.

The contention on behalf of the landlord here would really be an abrogation of the 1st section of the Land Law Act of 1881. That section provides that the tenant for the time being of every holding may sell his tenancy subject to conditions which are stated. He must give to the landlord the prescribed notice of his intention to sell his tenancy. Then the landlord may exercise his right of pre-emption for such sum as may be agreed upon, or, in the event of disagreement, may be ascertained by the Court to be the true value.

The subject-matter the tenant can sell is the tenancy. The Act of 1881, and section 4 of the Act of 1870, draw a distinction between improvements and the tenancy. Again, in section 8, sub-section 4, of the Act of 1881, improvements are kept separate from the tenancy itself. It is an absurdity to suppose that though in every case the tenant can sell his tenancy, he yet must give it to the landlord for nothing when he has not executed improvements, and that in every such case the true value must be nothing.

FitzGibbon and Barry, L.JJ., concurred.—Irish Reports, 1896, 356.

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Sub-Com.
October 27,
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(Before CREAN, A.L.C.)

Gawley v. Dartrey.

*True value of tenancy—Land Law (Ir.) Act, 1881,
section 6.*

Held (*per* ADAMSON and CARROLL, Commissioners), the "true value" is what, in the opinion of the Commissioners, on examination of the holding, would be a fair and reasonable price for same.

Held (*per* CREAN, Chairman), the "true value" is the best price that can be got for the holding, regard being had to the interests of the landlord and tenant respectively in the tenancy therein.

Adams v. Dunseath, 10 L.R.I., 109, *ante*, p. 141, and Curneen v. Tottenham, 30 I.L.T.R., 26; 1896, 2 I.R., 37, 356, *ante*, p. 509, *considered*.

The facts are stated in the Judgment.

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CREAN, A.L.C.—This is an application to fix the true value of the tenancy. The tenant might have sold under the Ulster custom in the open market, if he thought proper; but he has elected to proceed under the Land Act, and by our order £600 is ascertained to be the true value of the holding. I am sorry to say that I am obliged to dissent from the decision of my colleagues in this matter. They are of opinion that £600 is the true value of the holding. I consider the true value to be £750. As I dissent, I think it right to state my reasons for so doing. The 1st section of the Land Act of 1881 provides that the tenant may sell his tenancy for the best price that can be got for the same, subject to the regulations mentioned. The tenant must give notice to his landlord of his intention to sell, and on receiving such notice the landlord may purchase the tenancy for the amount agreed upon between the parties; or, in the event of disagreement, for such sum as may be ascertained by the Court to be the true value. Now, what is the true value—what is the definition of the “true value” of the tenancy? Lord Chancellor Law, in *Adams v. Dunseath* (10 L.R.I., 109, p. 125), has defined the true value of a tenancy to be what it would *bond fide* bring in open market if sold to an unobjectionable purchaser. In that definition the late Lord Chancellor Sullivan differed from him. His definition of the true value of a tenancy was “not the market value, but what having regard to the interest of landlord and tenant respectively, would be the true estimate of price between them” (*Adams v. Dunseath*, 10 L.R.I., 109, p. 143); and he thought that the right of sale was a restricted one.

Now, I adopt the definition laid down by Lord Chancellor Sullivan. For instance, a case of this kind might occur:—A tenant might have large improvements on his farm made by him in pursuance of a contract entered into for valuable consideration, or for

which he might have been fairly compensated and paid by the landlord, and in that case the true value would be the best price which might be obtained at a sale of the land in the open market, less the value of the improvements for which the tenant had been paid and compensated by the landlord. In this case there are no improvements made on the land, and, in my opinion, the true value of the tenancy in this case is the best price which a reasonable and prudent man would pay for it. In *Tottenham v. Curneen* (30 I.L.T.R., 26) FitzGibbon, L.J., says—"When the tenant sells, he is entitled to receive either the market price or the true value, according as the purchaser is a stranger or is the landlord." And again—"It seems to me that the relation between the true value which the landlord must pay and the full price which the tenant might get in the open market is very similar to that which exists between the 'fair rent' which the Land Commission is bound to fix, and the 'competition rent' which the landlord is no longer at liberty to exact." What is it which reduces the competition value to the true value? It is, in my opinion, the interest which the landlord has acquired in the tenancy by improvements made or compensated for by him, or by such share of the increased value of the land as he is entitled to. The landlord in this case makes no claim to any such interest, and, therefore, the tenant is, I think, entitled to sell his tenancy for the best price which a farmer of ordinary prudence and knowledge would give for it.

There was a great deal of evidence given in the case, to which I must briefly refer. Mr. Henry K. Leslie, on behalf of the landlord, puts the true value of the tenancy down at £401 10s. Mr. Thomas Leslie, a farmer, fixes the true value at £446 10s. Mr. J. Scarlett says that the buildings had suffered a good deal, and Hugh Jordan, the bailiff on the estate, said that the farm was in a waste condition. For the tenant, Mr.

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1896.

Gawley
v.
Dartrey.

Crean, A.L.C.

Sub-Com. William Marshall Fitzgerald said that he thought that
 October 27, the holding would bring £800 if offered in the market.
 1896. Mr. Robinson was also examined. He is a gentleman
Gawley of very large experience in these matters, and he said
 v. that he knew the lands well ; that the value of the
Dartrey. tenant's interest, in his opinion, is £800. Jason Graham
 Crean, A.L.C. was also examined for the tenant, and he stated that he
 had actually made an offer of £735 for the tenant's
 interest in the holding. I asked him if he was prepared
 to stand by that offer. He replied that he was, and
 that he had paid £20 an acre for land in the same
 locality. Now, that is a very strong fact in the case.
 I have no reason to doubt Mr. Graham. He appeared
 to be a solvent and respectable man ; was said to be a
 holder in fee of several portions of land. We have also
 examined another gentleman, whose evidence ought to
 carry a great deal of weight—that is, Mr. Harvey—and
 he fixed the fair value of the holding at £740. That is
 the evidence in the case.

The Commissioners went on the land, and they
 thought that a fair and reasonable value of the tenancy
 was £600. My impression is, that the Commissioners
 have misapprehended the duty imposed upon them by
 the statute. It is not their opinion as to what is the
 fair and reasonable value of the tenancy after an
 examination of the land is the true value ; but the true
 value is, in the words of the statute, the best price that
 can be got for it from a reasonable man, due regard
 being paid to the interests of the landlord. That is, in
 my opinion, the true value of the tenancy. The tenancy
 is the property of the tenant ; the landlord has no share
 in that property, except subject to the conditions which
 do not exist in this case ; he has no right to any portion
 of the amount that would be given for the tenancy,
 except where improvements have been made, or the
 letting value of the lands increased, and where these
 improvements have been paid for or otherwise com-

pensated for by the landlord, or he is entitled to such increase. Under these circumstances I have come to the conclusion that the tenant could obtain £750 for his tenancy. That, I think, having regard to the evidence, and to what I consider a fair interpretation of the statute, would be the true value of the tenancy; and under these circumstances I am obliged to dissent from the decision of the other Commissioners.

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I.L.T.R., xxx., 171.—An appeal is pending in this case.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
December 18,
1896.

(Before ASHBOURNE, C., FITZGIBBON, BARRY, and
WALKER, L.JJ.)

Johnston v. Courtenay.

*Land Law (Ireland) Act, 1881—Pre-emption—Sale of—
Compensation for Disturbance—Landlord and Tenant
(Ireland) Act, 1870.*

This was a case stated for the opinion of the Court of Appeal by the Chief Land Commission at the request of the representative of the landlord. The holding, which is in the county of Armagh, is 3 acres, 2 roods, 22 perches, statute measure, in extent, and is held under a tenancy from year to year at a rent of £4 8s. 2d., which is not judicial. There are no buildings on the holding, the Poor-law valuation of which is £4 10s. The tenant having served notice of an intention to sell, the landlord served notice claiming his right of pre-emption under section 1 of the Act of 1881. The case came before the Sub-Commissioners, who, by an

Appeal.
December 18,
1896.

Johnston
v.
Courtenay.

order of the 7th November, 1895, fixed the true value of the holding at £68. The landlord required a rehearing before the Chief Commissioner, which took place ; and it was submitted on the part of the landlord that as no improvements had been proved to have been made by the tenant or his predecessors in title, the "true value" of the holding should not be more than the tenant would be entitled to receive as compensation for disturbance if he were compelled by the landlord to quit his holding. The Land Commission held that the arbitrary scale of compensation for disturbance fixed by the statute was not necessarily the measure of the true value of the tenancy in such a case as the present, and on the evidence before them, including that of their valuers, they fixed the true value at £60. The Court now unanimously affirmed the decision of the Land Commission. (See *Curneen v. Tottenham*, ante, p. 509.)
[Not reported.]

Land Appeal.
Omagh.
1872.

ASSIZES.

(Before MONAHAN, C.J.)

Johnstons v. Patton.

Landlord and Tenant (Ireland) Act, 1870—A landlord is bound to pay under the custom what a solvent tenant would give—Deterioration is not a subject of set-off under the custom, but may properly be regarded in estimating the bona fides of the valuation of the tenant-right.

Monahan, C.J. MONAHAN, C.J., said he saw no reason why he should not affirm the decree. There was no doubt whatever on the first point that the custom did exist. His Lordship

said that Mr. Holmes was perfectly right in not raising the question of the effect of the Landed Estates Court conveyance. He had no doubt whatever that the conveyance had no such effect as to do away with the custom, which had been made enforceable at law by the new Land Act. There was no real reason why any of those men, who were willing to pay the £300 for the farm, should not be accepted by the landlord, except this: either that the landlord wished to keep the farm in his own hands, or to give it to his son or nephew or some relative. If he wished to do that, he must pay what a respectable and solvent tenant would be willing to pay. His Lordship did not say that he would take into consideration the state of the farm, and if bad farming and things of that kind had been proved, it might have had an effect upon him; or if he had found people swearing that they would give £300 for a farm which they knew to be in a wretched state of cultivation, and quite ruined, he would not believe them. Having heard all the circumstances, he would affirm the decree of the Chairman.—Donnell, 181.

Land Appeal.
Omagh.
1872.

Johnstons
v.
Patton.

Monahan, C.J.

COURT FOR LAND CASES RESERVED.

Appeal.
January 9, 10,
1873.

(Before O'HAGAN, C., SULLIVAN, M.R., MONAHAN, C.J., C.P., CHATTERTON, V.C., FITZGERALD, J., MORRIS, J., LAWSON, J., BARRY, J., and DOWSE, B.

Stevenson v. The Earl of Leitrim.

Landlord and Tenant (Ireland) Act, 1870.

A tenant of lands then subject to the Ulster tenant-right custom having been served with a notice to quit in 1867, entered into a written agreement with his landlord

Appeal.
January 9, 10,
1873.

Stevenson
v.
The Earl of
Leitrim.

to take the lands as tenant from year to year, determinable by six months' notice to quit, with a clause that he should not assign, sub-let, let in con-acre or for a crop, or sub-divide for grazing, or part with the possession of the land, or any part thereof, and that on breach he should pay an additional rent, recoverable as the rent reserved; and with clauses that he should not be entitled to any compensation for any building or improvement unless previously stipulated for by an agreement in writing, signed by both parties, and that the tenancy should cease on the bankruptcy or insolvency of the tenant. The landlord determined the tenancy by a notice to quit.

Held, that the tenant was entitled to the benefit of the Ulster tenant-right custom (diss. Chatterton, V.C., and Morris, J.).

A contract, though inconsistent with the custom, will not deprive a tenant of his right to compensation (per Sullivan, M.R., Lawson, J., Barry, J., and Dowse, B.).—Donnell, 340.

ASSIZES.

Land Appeal.
Down,
1873.

(Before LAWSON, J.)

M'Cullough v. Waring.

Landlord and Tenant (Ireland) Act, 1870.

Held, that tenant-right will not attach to a farm held under a lease made in 1851, it being admitted that the custom only began to be practised on the estate in 1850. Whether the custom extends to leasehold tenancies is a matter of fact. A landlord cannot by recent alterations destroy a usage of ancient date, if that usage can be shown to attach to the holding. A

claimant, held not entitled under section 1, is entitled to have his claim, under the general provisions of the Act, remitted to the chairman for his adjudication.—Donnell, 385.

Land Appeal.
Down.
1873.

COURT FOR LAND CASES RESERVED.

Appeal.
1873.

(Before O'HAGAN, C., WHITESIDE, C.J., SULLIVAN, M.R., CHATTERTON, V.C., DEASY, B., FITZGERALD, J., MORRIS, J., LAWSON, J., BARRY, J., and DOWSE, B.

Friel v. The Earl of Leitrim.

Held (*Whiteside, C.J., and Morris, J., diss.*), that sub-division will not disentitle a claimant to the benefits of the custom, where the usage is to require the person who came in by the sub-division to sell to the other occupier, and it is not proved that the landlord made such a requirement.

The Lord Chancellor delivered the Judgment of the majority of the Court :—

1. The holding was proved to be subject to the Ulster Tenant-right custom. O'Hagan, C.

2. It was contended on behalf of the respondent that the claimant, by sub-dividing his holding, contrary to the rule prevailing on the estate, had disentitled himself to the benefit of the custom.

3. George Friel, the father of the claimant, was originally the tenant of the holding; he died in 1865, leaving two sons, Michael, the claimant, and Daniel.

After the death of George, Michael was recognised as the tenant, and the receipts were given in his name; but George Friel had, in his lifetime, made a division of the farm between Michael and Daniel, and Daniel continued to live upon the farm, and had a house upon it;

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Leitrim.

but Lord Leitrim was not aware of this until the year 1871, and treated Michael as the sole tenant; he then brought an ejectment, and in December, 1871, evicted Daniel and Michael.

4. It was proved on behalf of Lord Leitrim that it was the duty of the bailiff to report to the office any case of sub-division; that he did not report this case, and that Lord Leitrim or his agent did not know of it until 1871. It was proved that sub-division was contrary to the rules of the office, and that the usage was, when sub-division took place, to require the person who came in to sell his interest to the other occupier, and if the parties did not agree as to the price, a person was appointed by the office to settle the price to be paid to the person going out. It was not proved to be the usage to evict the parties without giving them the power of disposing of their interest to a single occupier.

O'Hagan, C.

5. Under the above circumstances it was contended on behalf of the claimant that he had never sub-divided the land, and that, in any case, according to the usage proved, he should have been allowed to sell and dispose of the interest in the farm. With the concurrence of Mr. Justice Keogh I reserved the case.

The question for the consideration of the Court is, whether the claimant disentitled himself to claim the benefit of the custom to which the holding was subject, if not discharged from it by sub-dividing in violation of the usage.

In the first place, the Judgment of this Court must be founded on the facts in the case stated, and nothing else. The question is, whether the claimant forfeited his right by reason of the sub-division which took place. Now, *per se*, the sub-division did not, according to the Judge's finding, entitle Lord Leitrim to resume possession. It was a step towards that result, but only a step; for the usage cast upon Lord Leitrim the duty of requiring the person who came in to sell his interest to

the other occupier, so that the land should be left in the occupation of one tenant.

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If Lord Leitrim had fulfilled this condition, and given the opportunity of selling to a single occupier, his authority to evict would have been complete, and the tenant would have been entitled to no compensation whatever. That seems to me the plain and inevitable conclusion from the facts stated by the Judge; and the result must be affirmative of his Judgment, and the reversal of the Judgment of the Court below. It was suggested in the course of the argument that the case did not present sufficient proof of Lord Leitrim's neglect to make the requirement prescribed by the usage as the condition of eviction; and we were pressed on this ground to remit it to the Court below, that further inquiry might be made on this point, but I do not think that we need any such assistance. The Court should take it that the Judge has set forth all the facts material for the consideration of the case, and that assumption excludes the supposition that there was any proof of the essential requirement by Lord Leitrim. The duty of making that requirement was cast upon the respondent, and on him also lay the onus of showing affirmatively that such a requirement, in fact, was made. It did not rest on the plaintiff to prove the negative; and this being so, and his evidence on the point not being reported, manifestly because none was given, there is no need of further investigation, and this case of the respondent fails through his own default.

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v.
The Earl of
Leitrim.

O'Hagan, C.

Again, we were pressed on the form of what were called the pleadings; and it was said that the claimant should fail because he relied on the general usage, without the qualifying conditions that were proved to have been attached to it. But it appeared to me that the claimant's case was properly stated. He claimed the entire benefit of the general usage, and if our decision be correct, he was entitled to claim it, for, as I

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Leitrim.

O'Hagan, C.

have said, the omission of Lord Leitrim to fulfil the obligation laid upon him relegated the tenant to his general right, and on that right he was warranted to insist, unless the respondent could affirmatively and by way of answer meet his reliance on it by observing that it was nullified, under the actual circumstances, by the operation of the rules of the estate, which he has failed to do.

As to the amount of damages, much had been said ; but whatever might be the equities, if there be any, between the brothers Friel, the claimant here was the accepted and recognised tenant of Lord Leitrim, and the only person by whom, under the Land Act, the compensation could have been claimed. I do not think, therefore, this contention is maintainable on Lord Leitrim's part ; and I shall only add, without discussing the matter further, that as to damages no question has been reserved, and that it is not, therefore, open for even consideration on the case as stated ; and I shall add for myself that I see no reason for doubting that the learned Judge, who had so much better opportunity of accurate judgment on the point than we possess, reached a perfectly right conclusion. The result will be that the dismiss of the learned Chairman must be reversed, and a decree for £169 pronounced in favour of the claimant.—Donnell, 335.

MONAGHAN SUMMER ASSIZES.

(Before FITZGERALD, J.)

Appeal.
1874.

Summer
Assizes.

Magee v. Marquis of Bath.

Lands anciently subject to the Ulster tenant-right custom—part of an estate on which the custom was observed from 1851 to 1860—were in the famine years surrendered by the tenants, who left while owing arrears of rent, and were assisted by the landlord to emigrate. They were subsequently, in 1859, relet by the landlord, who had occupied them in the interval, to a tenant who undertook to erect a dwelling-house on the lands.

Held, that the reletting was subject to the Ulster tenant-right custom.

FITZGERALD, J.—In what was called the “bad times” the tenants abandoned the possession, owing some arrears, and some were assisted to emigrate. The lands remained in Lord Bath’s possession for some time, until they were let to a man named Gilmour in 1857. He, too, abandoned their possession in 1858, owing some arrears. The letting to the present claimant took place in 1859. It was on these circumstances that the Marquis of Bath rested his case of the acquisition of the tenant-right. . . . Whether there was such an acquisition as would come within the meaning of the statute may be doubted. The section of the Act will seem to have reference to cases where the landlord had purchased up the tenant’s interest, with a view to extinguish the usage. On this I express no opinion. . . . I have no doubt as to one matter of fact, and that is, that whenever it comes to be investigated, it will be found in multitudinous cases that where, before the passing of the Land Act, the land had come into the possession of

Fitzgerald, J.

Appeal.
1874

Summer
Assizes.

*Magee
v.
Marquis of
Bath.*

Fitzgerald, J.

the landlord free from any tenancy or claim, and was relet by him, the new letting was considered to be subject to the usage, and treated and dealt with accordingly. The question I now propose to consider as a question of fact is, whether the letting to the claimant in 1859 was by fair implication excluded from or included in the usage of tenant-right then prevailing on the estate. The usage prevailed generally on the estate. . . . The claimant came from a neighbouring county and a different estate, where he had held a farm, and I suppose disposed of it in the usual way. He came to a county where tenant-right pretty generally prevails, and to take lands which had been actually subject to it. He agreed to become tenant in 1859. By the agreement which was signed on the occasion, Magee undertook to pay a year's rent, not as arrears, and that he should expend £100 on erecting a dwelling-house. It seems from this that the tenant was to pay a fine or purchase-money. He was to pay the entire year's rent of 1858, not as arrears, nor would it be reasonable to ask him to put himself under the obligation to pay £100 to be applied on erecting a house on the farm. I presume the house already upon it must have been considered unsuitable for the residence of a tenant. It appeared further that he was to come in under the ordinary rules of the estate. If it was intended that this holding was not to be subject to the ordinary custom of the estate, Mr. Trench, the then agent, should have so informed the tenant. Nothing has since happened to deprive the tenant of his rights under the said custom, which since 1860 no longer depends on the will of the landlord, but is enforceable by law ; and I shall award him compensation under the custom, but reduce the amount fixed by the chairman.—
Monaghan Summer Assizes, 1874, I.L.T.R., 72.

ASSIZES.

Assizes,
Omagh.
1874.

(Before FITZGERALD, B.)

Donnelly v. Shield.

Landlord and Tenant (Ireland) Act, 1870.

A tenant who parts with his interest in his farm without the landlord's consent—the custom of the estate being that the landlord should have a voice in the selection of the incoming tenant, and that an adjoining tenant should have the preference—disentitles himself to the benefit of the custom.

This was an appeal from the decision of the chairman, who had dismissed the claim, which was under section 1 of the Land Act. Donnelly, the appellant, in consideration of certain payments, obtained from his brother a farm in Donaghinie, held by the latter under a tenancy from year to year. This transfer was not acknowledged by the landlord, being, as alleged, contrary to the custom of the estate; and a notice to quit was served. The respondent contended that the custom of the estate was, that if a tenant wished to part with his farm, he should first obtain the consent of his landlord, and then proceed to sell by private sale to the adjoining tenant, the purchase-money, if the parties disagreed, to be settled by arbitrators appointed for the purpose. If the adjoining tenant could not purchase the farm, others got an opportunity of doing so; but a preference was given to a resident on the estate. The appellant contended that the custom of the estate was to sell to the highest and best bidder, if the purchaser was a solvent person, and approved of by the landlord. The chairman dismissed the claim, on the ground that

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Assizes,
Omagh.
1874.

Donnelly
v.
Shield.

Fitzgerald, B.

the custom proved was one of sale, with the approval of the landlord, the adjoining tenant, if able and willing to purchase, having the preference; and that this custom had been violated by the present claimant.

FITZGERALD, B., held that the claimant had failed entirely to prove the existence of the custom which he alleged. A custom there was of some kind, and plainly the landlord had a right of insisting that the adjoining tenant or tenants should get preference as purchasers. The tenant in this case had acted in defiance of the landlord. He would not like to determine what the custom of the estate was; but plainly the landlord had a voice in the matter. If the custom was enforceable, it must be enforced against the tenant as well as the landlord. The tenant in this case transferred his interest without giving the landlord an opportunity of approving of or objecting to the incoming tenant. He must dismiss the appeal with costs.—Donnell, 486.

ASSIZES.

Assizes
Monaghan.
1874.

(Before FITZGERALD, J.)

Lappin and another v. Coote.

Landlord and Tenant (Ireland) Act, 1870.

On an estate where the custom is that the sale should be with the consent of the landlord or his agent; who fixes the price and selects the incoming tenant, a tenant sold to an adjoining tenant, notwithstanding notice by the agent that the sale would not be permitted.

Held, that neither the outgoing nor the incoming tenant could sustain a claim under the Ulster custom.

FITZGERALD, J., held that the custom to which this holding was subject was one of sale, but not without the consent of the landlord or his agent, who fixed the price and selected the incoming tenant. Lappin parted with his interest to the other claimant, Little, and thereby ceased to be a tenant, and, therefore, he could have no claim. Little bought after being distinctly informed by the agent that he would not be recognised as tenant without the previous approval of the landlord or his agent. Notwithstanding this notice, he persisted in purchasing. To sanction this would be to deprive the landlord of his rights under the Ulster custom. The chairman's decree must, therefore, be reversed. At the same time, as the question was important, he was willing to reserve a case for the Court for Land Cases Reserved.

Assizes,
Monaghan.
1874.

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another
v.
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Fitzgerald, J.

No case was reserved.—9 I.L.T.R., 72.

ASSIZES.

(Before WHITESIDE, C.J.)

Assizes,
Omagh.
1875.

O'Brien v. Scott.

*A landlord capriciously refusing to accept a purchaser of a tenant-right interest, is bound to pay compensation—
Landlord and Tenant (Ireland) Act, 1870.*

The claimant O'Brien purchased the interest of one M'Nulty, but would not be accepted as tenant by the landlord, who offered to repay him the amount he was out of pocket, and at the hearing of the appeal continued this offer.

WHITESIDE, C.J., expressed his disapproval of the conduct of the tenant; and whilst giving a decree for

Whiteside,
C.J.

Assizes,
Omagh.
1875.

O'Brien
v.
Scott.

the amount offered by the landlord, less costs, said :
“ When a tenant desires to sell, his course is to write a letter to the landlord, or go to him and say: ‘ Here is John Brown, a neighbour of mine, an honest, respectable man; I wish to sell to him.’ And, then, if John Brown is that honest, respectable man, and the landlord capriciously refuses to accept him, and the custom is proved to exist, I would decree against the landlord. But the landlord should have the right of choosing his tenant. Transfers of tenancies should not be made behind his back without his knowledge of what is being done.”—Donnell, 495.

Assizes,
Lifford.
1875.

ASSIZES.

(Before FITZGERALD, B.)

Byrne v. Earl of Arran.

Landlord and Tenant (Ireland) Act, 1870—Purchase of the Ulster tenant-right custom—Letting wholly or mainly for the purpose of pasture.

The claimant, Mary Byrne, wife of Wm. H. Byrne, the other claimant, was administratrix of John H. Dillon, an hotel-keeper in the town of Donegal, who died in July, 1872, intestate. In 1846 one Rutherford surrendered the lease of his farm to the Earl of Arran, receiving an annuity of £40. John H. Dillon then became tenant of this farm, with the exception of a few acres which were given to another tenant, named M'Loone. The Earl of Arran also paid the interest of a considerable sum of money, borrowed from the Board of Works, which had been spent in improving the farm. The respondent, on Dillon's death, demanded an increase of rent from the claimants, and also required

them to reside on the premises. Mr. Byrne was an architect, residing in Dublin, and refused to reside, or to pay the rent demanded. A notice to quit was served, whereupon a claim was made under the Ulster tenant-right custom. On behalf of the respondent it was urged that, though the custom prevailed generally on the estate, the landlord had in respect of this farm, by the transaction with Rutherford, acquired the Ulster tenant-right custom; and that the letting to Dillon was a letting exclusive of the custom. The chairman held that the surrender of the lease by Rutherford was not an acquisition by the landlord of the tenant-right custom so as to deprive the tenant of the benefit thereof, but held that the holding was let as a grazing farm, and, inasmuch as the tenant did not reside on the same, nor was it adjoining or ordinarily used with the holding on which he resided, that he was not entitled to compensation under the 15th section of the Land Act. An appeal was taken by the claimant. On the appeal evidence was given on behalf of the claimant that a large portion of the farm was used for tillage; and a draft lease was produced, which was tendered to Dillon in 1846, but which he refused to sign, on the ground that he objected to the covenants it contained as to the mode of cultivating the farm. It also contained a covenant to grind the corn grown on the premises at a particular mill.

Assizes,
Lifford,
1875.

Byrne
v.
Earl of Arran.

FITZGERALD, B.—*Held*, that it was the interest of Rutherford under the lease, and not the Ulster tenant-right custom, which was purchased by the landlord; that the farm was not let to Dillon to be used wholly or mainly as a pasture farm; that, in the correspondence between Mr. Byrne and the respondent, the latter had acknowledged the existence of the tenant-right custom; and he reversed the dismiss, and decreed for £400 and costs.—Donnell, 487.

Fitzgerald, B.

Assizes,
Armagh.
1875.

ASSIZES.

(Before MORRIS, J.)

Turner v. Nolan.

Landlord and Tenant (Ireland) Act, 1870.

A small estate, surrounded by estates on which the custom prevails, must be presumed to be subject to the same custom, in the absence of proof to the contrary.

This was a claim under the Ulster tenant-right custom. The respondent in 1864 purchased a townland, part of an estate, on which there was no restriction on the amount of sale under the custom. He stated that since the date of his purchase he had permitted no sales, and that during the time of the previous agent, Mr. Stanley, 1850 to 1864, there were no sales on this townland. Previous to and since 1864 the custom was freely allowed on the other townlands on the same estate.

Morris J MORRIS, J., held the custom established. Tenant-right existed in all the surrounding district. The respondent had failed to prove that his little estate formed what the respondent deemed an oasis in a tenant-right country. He would require some distinct proof to the contrary before he would hold that an isolated townland was not subject to the custom which prevailed on all the neighbouring estates.—Donnell, 496.

Land Com
June,
1893

LAND COMMISSION.

(Before BEWLEY, J.)

Boyle v. The Marquis of Conyngham.

*Sale of a tenancy on an estate subject to the Ulster custom
—Preference to adjoining tenant—Land Law (Ireland)
Act, 1881, s. 1, s.-s. (12).*

A tenant on an estate subject to the Ulster custom, assigned his tenancy under that custom. On the estate it was usual to make sales, with the approval of the landlord, preference being given to an adjoining tenant. As the assignee was not an adjoining tenant, the landlord refused to recognise the sale.

Held, that the assignee had not the *status* that would entitle him to have a fair rent fixed.—I.L.T.R., xxvii., 110.

SUB-COMMISSION.

(Before GREER, A.L.C.)

Sub-Com.
October 12,
1895.

Porter v. Duke of Abercorn.

Ulster tenant-right—Increased letting value of holding arising from development of the district, etc.—Area, 74 acres, 2 roods, 19 perches ; rent, £65 10s. 5d.

GREER, A.L.C.—This case was heard at Omagh. Mr. William Wilson represented the landlord, and Dr Todd appeared for the tenant, and urged upon the Court some novel propositions, upon which he asked for

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my legal directions to my colleagues. The lands are situated within five miles of the city of Derry, and the questions involved in the tenant's application arise upon the following particulars of his claim for allowances, as set on his originating notice. The tenant relies on the tenant-right interest created by the labour and expenditure of the tenant and his predecessors in title, and on his and their improvements in various ways, including, *inter alia*, contributions towards the construction of roads, for access to markets and churches, and neighbours' residences, towards county buildings and the administration of justice, and the preservation of the peace; towards the maintenance of the poor, and generally towards the creation of a settled and progressive district, whereby a substantial increase in value was given to the holding—£1,000; buildings erected on farm, £1,300; farm road and streets, £50; fences, 1,078 perches, at 2s., £107 10s.; 278 perches of open drainage at 5½d., £6 10s.; 50 acres stubbed, levelled, sub-soiled, reclaimed, and fertilized, at £10 per acre, £660; 20 acres reclaimed from cut-over bog, thoroughly drained, sub-soiled, and fertilized, at £10 an acre, £200—total, £3,327; and the tenant claims that no rent should be charged on his improvements or on the interest in the holding, as created by him or his predecessors in title, or which shall in any way limit or affect such interest. The total amount of the tenant's claim is £3,327, and if the Court found that he was entitled to even a moiety of the sum claimed, the result would be that the landlord's interest in the holding must disappear. The case is, therefore, in that respect, at least, a peculiar one.

The tenant's solicitor, in dealing with the claim, contended that the lands were originally waste and uncultivated, and that, owing to the energy and capital of the tenant and his predecessors, they had been transformed into their present arable and rent-producing condition. He further argued that the tenant had contributed to

the whole of the county cess, out of which the county roads, bridges, and county buildings had been provided, and that thereby the peace and prosperity of the district had been promoted, and the value of the holding enhanced; that such expenditure by the tenant and his predecessors towards local public affairs, together with the improvements effected upon the holding itself, contributed to the tenant-right interest in the holding, and which, he maintained, should be protected and exempted from rent.

Now, I may observe that in ascertaining the productive capacity of a holding, and its consequent fair-rent value, I have never presumed to interfere with the discretion and judgment of the several gentlemen who have been from time to time judicially associated with me. I have confined my action to directing them upon legal questions affecting the allowance or disallowance of claims for works and improvements proved to exist upon the holding, and those directions have been based upon what I conceive to be the law as laid down and settled by higher authorities. Following those directions, the practice of the several Sub-Commissions over which I have presided has been to ascertain the extent of the tenant's improvements by evidence in court, and by inspection to test the value of them; that being accomplished, to allow the tenant a percentage (varying according to the class and character of the work) on the capitalized value thereof; then, deducting that amount from the gross annual value of the holding, to declare the balance to be the fair rent. In adopting the practice I have indicated I have invariably endeavoured to protect the tenant's interest against any encroachment whatever, and beyond that I am not prepared to go. In the advancing prosperity of the district the tenant, through the establishment of fairs and markets, roads, railways, and harbours (to most of which he has not contributed anything), has participated equally with the

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landlord ; and the only consideration which should influence my colleagues in fixing a judicial rent under such circumstances is, Has the landlord taken advantage of that prosperity to unduly assess the tenant with rent? and has that assessment encroached upon or in any way diminished the tenant-right interest of the tenant? In this case to accede to Dr. Todd's contention, and direct my colleagues to take into their consideration the various extern elements that are alleged "to have contributed to the peace and prosperity of the district," would land them in a labyrinth of perplexity and confusion, and it would be absolutely impossible for this Court to deal with such questions in arithmetical or algebraic quantities.

Hitherto in the County Derry I refused to take into account as against the holdings of individual tenants the large expenditure of the London companies upon schools, churches, and other public institutions, upon the ground that they were too general and remote to be considered as affecting the annual value of A or B's separate holding for agricultural purposes ; and upon the same principle I decline to ask my colleagues to involve themselves in the consideration of how far the tenant and his predecessors have contributed to the county cess, and thereby assisted "generally towards the creation of a settled and progressive district." Dr. Todd put forward a second point, which involves the important question raised in the case of *Adams v. Dunseath*—namely, in estimating a fair rent is the tenant entitled to credit over and above the actual cost of his improvements to a portion of the increased value which those improvements have developed? Upon that important question the Court cannot be guided by a higher authority than that of Lord Justice FitzGibbon, who, in dealing with the decisions of the Court of Appeal in his evidence before the select committee of the House of Commons on the Irish Land Acts, intimated that the

Court of Appeal did not decide that in all cases the entire improved letting value, the result of such improvements (after deducting interest on the actual cost thereof), belonged to the landlord, but that it might in certain cases be allocated between the landlord and tenant according to their respective interests in the holding, due regard being had to those two interests according to the facts and circumstances of each individual case, adding that it was for the Court to decide how much should go to the one and how much to the other. In dealing with the reclamation improvements of tenants, I will in future give effect to that pronouncement of his Lordship, and direct my colleagues accordingly. It was intimated at the hearing that the principles involved were considered so important as regards Ulster holdings that the case would probably be taken further. I can only say that I would regard such a procedure with satisfaction, as the Court would thus secure a settled decision for its future guidance.

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NOTE.—See following case, *M'Glynn v. Duke of Abercorn*, in which similar questions are dealt with by the Land Commission.

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(Before BEWLEY, J., and FITZGERALD, Q.C., Commissr.)

M'Glynn v. Duke of Abercorn.

*Ulster custom—Presumption as to Improvements—
Agricultural buildings—Equipments of holding.*

NOTE.—This being one of the most recent decisions given on the important subject of Ulster tenant-right, as affecting tenant's improvements, and the case having been conducted by eminent counsel, it has been deemed

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advisable to give an abstract of the evidence and arguments. The case was heard before the Land Commission at Strabane on the 23rd of October, 1895, when the tenant, who was seventy-three years of age, deposed that his holding was a tillage farm, the house and offices were his; he had reclaimed 10 acres from waste, and had made extensive drains and fencing. For the tenant a number of legal questions were raised, which it was submitted should guide the Court in fixing the rent. First, that all the improvements effected by the tenant or his predecessor in title should be credited to the tenant, and that *Adams v. Dunseath* with reference to improvements did not affect an Ulster tenant-right case. Secondly, the presumption was that all improvements on an Ulster tenant-right farm were made by the tenant or his predecessors, unless positive evidence were given that they had been effected by the landlord. Thirdly, that the tenant was entitled to have the judicial rent reduced by the amount which the cost of the buildings added to the value of the farm. Then there was the question how the respective interests of landlord and tenant were to be dealt with.

SERGEANT HEMPHILL, Q.C., M.P., in opening the arguments on behalf of the tenant, said the Court would recollect that this case was before them at Strabane, when evidence was gone into, and the case stood over for their Lordships to hear counsel address them upon the evidence, and the principles on which it occurred to counsel for the tenant a fair rent should be fixed. He would call their Lordships' attention shortly to the principal points that had been established in evidence; and he thought if ever there was a case in which the efficacy of the Act of 1881 would be shown to apply, it was in the present case. The tenant, M'Glynn, was a very old man, and it appeared in evidence that this farm, which consisted of 48 acres on the Duke of Abercorn's estate in the North, was taken by the

tenant's father so far back as 1815, and the tenant's own recollection went back as far as 1834 or 1835, so that they were able now to have a complete and accurate survey of what the history of this farm was for the greater part of the century. It was a common fact in the case that the Ulster tenant-right—that is the right to sell at a fair and reasonable rent—prevailed on this farm, as well as on all the Duke of Abercorn's estate in that district. It was, in fact, a typical case of Ulster tenant-right, and it also appeared clearly on the evidence that this farm was a sort of rough mountain farm, with very little inherent capability in the soil itself. The acreable contents of the farm were 48 acres.

The evidence went to show that at the present moment—and it was an important consideration and useful element in the case—there were two of those 48 acres in a rough, unimproved state, and looking at these 2 acres one could acquire a very accurate view of what the entire farm was before it was improved and reclaimed. These 2 acres being in a wild state, there were 10 acres reclaimed under circumstances he should shortly mention, by this tenant's improvements, and the balance of the land was drained and fenced, and a road was constructed by the tenant from one end of the farm to the other—a farm road that had not existed before. They had upon the evidence, further, that there was a dwelling-house on the land, which was there beyond the recollection of the tenant (M'Glynn), but, besides that dwelling-house, in which he and his family lived, it also appeared that the tenant had built considerable farm offices, which were not there before, and which were, of course, necessary and essential to enable him to profitably farm and treat this holding as an arable farm. There was a lease for one life or thirty-one years, and the rent reserved under that lease, which expired after the Act of 1881, was £29 8s. 4d. There were an appeal

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and a cross-appeal here. The rent fixed by the Sub-Commission was £21, and the tenant said that that was wholly inadequate and insufficient, and that no matter what view might be taken of general principles of the rights of the Ulster tenant, that this case, at all events, demonstrated that to fix such a rent now on the tenant would be doing him a most palpable injustice. No question was raised as to the *bona fides* of the tenant's expenditure.

The tenant in this case was a good specimen of a North-country farmer, and would not indulge in any flights of imagination. He built office-houses, fenced and drained the farm, and reclaimed portion of it, the total amount he had expended being £623. In any view of the case under the Act of Parliament no rent could be charged on the tenant's improvements, or in any of the various suggestions that were put forward by the different Sub-Commissioners that were examined before that celebrated historic Committee on the Land Act, that £623, without giving the very lowest possible percentage to the tenant for his money, ought to reduce this rent by a sum of £18 or £19 at least. If they were dealing there with questions of policy, long and learned arguments might be advanced as to the result that such figures worked out ; but they had nothing in that Court to do with questions of policy, and they had merely to consider what, in its wisdom or unwisdom, if his learned friend on the other side wished, the Legislature had thought fit to enact ; whether without going in the very face of the Act of Parliament—the 8th section and its sub-sections—rent could be charged on these improvements. He also submitted that the tenant should have a considerable rebate from the rent made in respect of the generally enhanced value of the land which was the result of his works of improvement. The value of this land when the tenant got it, and its value now by reason of the industry and capital of the tenant, demonstrated

that the toil and sweat of the tenant there had literally converted a barren waste into comparatively fertile land. It presented, indeed, an extraordinary picture of what human toil and labour and industry could do with a comparatively inhospitable and ungrateful soil. If the tenant was right, the tenant-right of this farm was worth £700, and supposing, apart from the Land Act altogether, the Duke of Abercorn had done as he might have done—bought out the tenant-right, so as to get rid of it on the farm—he would have had to pay the tenant £700. In common justice to the tenant the reduction could not fall short of £18 or £19 a-year at the least from the rent that at the inception of the proceedings was payable by the tenant.

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The evidence of Mr. Hanna, one of the witnesses examined, was that, as between man and man, the farm as now equipped was worth £24 1s. 10d. Another point which he would submit was that the valuing of a tillage farm such as the one in question as land apart from the buildings, and giving the tenant credit in the abstract for the latter, was a fallacious mode of valuation, and that in order to ascertain properly the value of the farm, it should be taken with the necessary out-offices, the roads, and the necessary means by which a tenant could live on that farm and make the rent out of it. They could not take the patch of 48 acres as if it had fallen out of the sky.

In the case at issue they were dealing with one farm. If there were no buildings on the farm, the tenant would have had to erect them, although if he held an adjoining farm with buildings, he might not. If a man held ten farms under such conditions from different landlords, possibly he might be put out of the one with the buildings, and then he would have to erect new buildings. The contention of the landlord was that no rent was put on the buildings, but that they were disregarded as a creditable item to the tenant.

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MR. JUSTICE BEWLEY.—I suppose you are aware that every acre of tillage land in Ireland has been valued independently of buildings by Sir Richard Griffith and his assistants. Certainly they have professed to be able to value tillage land and grass land quite independently of buildings on the farm. You will find in the directions given by Griffith a formula for the valuation of tillage land quite irrespective of any buildings. Undoubtedly it is the system prevailing for fifty years or more.

SERGEANT HEMPHILL.—Griffith's value was never adopted as a criterion of value between landlord and tenant in letting land, and whatever view may have presented itself, it was made merely for purposes of poor-law administration, and that, therefore, cannot apply now. Continuing, he said that the Act of 1881 says that you are not to charge rent upon the improvements of the tenant, and in order to carry out that he maintained it was impossible to segregate the value.

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MR. JUSTICE BEWLEY.—It is not impossible, as professional valuers north, south, east, and west, whether for landlords or tenants, professed to be able to value tillage lands independently of buildings. You say that is all wrong, and everything that has been going on in Ireland for a number of years is practically wrong.

SERGEANT HEMPHILL.—Even in Mr. Morley's Committee, your Lordship, it was Mr. Greer himself—

MR. JUSTICE BEWLEY.—The evidence before the Committee is not a matter to be referred to here.

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SERGEANT HEMPHILL.—I am here now merely for McGlynn advancing and endeavouring to submit arguments. Continuing, he submitted that in order to put a proper construction on and to properly carry out the 8th section of the Act of 1881, it was necessary to take into account the buildings upon the land, and not to segregate the buildings and land. Mr. Hanna, in his

evidence of valuation, said that if the buildings necessary to work the holding as a tillage farm were taken away, then it would be converted into a grass farm ; and when asked as to the value as such, he replied that he could not understand such land as grazing, since he considered it could not raise grass to fatten cattle. Assuming that the buildings were removed, and the equipment necessary to make it an arable farm in ten years, it would not be worth 4s. per acre. He (Sergeant Hemphill) contended that the only way they could value the farm was by having regard to what it was and what it had been made. Mr. Hanna considered the present value of the farm had been produced by the tenant from the time the farm was worth no more than 2s. 6d. per acre. Merely giving the price of the buildings was not, he maintained, sufficient compensation at all. They were not measuring compensation, but fixing the rent. That was the difference between the Act of 1870 and the Act of 1881. The Act of 1881 laid it down that the tenant was entitled, not as a bounty, but as a matter of law—positive law—to have a fair rent fixed, and to hold the land as long as he paid that fair rent, and performed the other conditions of the tenancy. The law said that that fair rent should not be charged on the tenant's improvements, and that regard must be had to both the interests of the landlord and tenant, and to all the circumstances and the district. They contended there that the tenant-right custom was altogether ignored by that Judgment—he said it with no want of respect, the rather confusing Judgment—in the *cause célèbre Adams v. Dunseath*, which had no application to Ulster tenant-right. The Judges pointed out over and over again—both the Judges of that time and since—dealing with the case, that the principle of the majority of the Judges in *Adams v. Dunseath* did not apply to the case of an Ulster tenant-right holding. Therefore, it would be

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contrary to the terms of the Act of Parliament if any rent were to be attached to any improvements that had been made by the tenant himself. There should be taken into account the enhanced value given to the land by the tenant, while the landlord should also be credited with what might have been the natural improvability of the land. That was really what was to be done in order to work out the Act as it stood. It was what really appeared to him to be the plain meaning of the Act. Fortunately their Lordships were not embarrassed by any of the *dicta* of the Judges in *Adams v. Dunseath*, because, as pointed out by Lord Chancellor Law, and recognised by most of the landlords of that day—

MR. JUSTICE BEWLEY.—There was no decision of the Court in *Adams v. Dunseath* in reference to the increased letting value, although statements to that effect had been widely made. There were *dicta*, but they differed.

SERGEANT HEMPHILL.—Really it was very difficult to know what was ultimately decided. It is clear that they studiously avoided deciding that whatever principle was put forward for the case applied to the Ulster tenant-right. That is acceded to; it is primarily pointed out.

MR. JUSTICE BEWLEY.—Lord Chancellor Law, dealing with the increased letting value, was clearly of opinion that the entire increased letting value did not necessarily go to the tenant.

SERGEANT HEMPHILL.—I thought there should be some rebate made for the natural improvability of soil. The same amount of money expended on good and bad lands would produce quite different results. Therefore it would not be an unreasonable thing to give the landlord some benefit for the value of the land. The learned counsel then read over the evidence given before the Sub-Commissioners on behalf of the landlord, and asked on what principle the Court below had fixed the rent at £21. It seemed to him they had

arrived at it by estimating the improvements at £160, which, taken at 5 per cent., would amount to the £8 by which the rent had been reduced. In other words, the toil and expenditure and industry had been subjected to rent contrary to the express words of the statute. In no possible view of the case could the present estimate be sustained, and he submitted that that being the case of Ulster tenant-right, their Lordships were bound to withhold from the landlord any rent upon the enhanced value of this farm, so far as that enhancement was due to the work and expenditure of the tenant. Their Lordships, he submitted, were to take into consideration the enhancement, the effect of the tenant's operations, and to say, however hard it might press on the landlord, that rent could not be charged upon that. Some landlords in the North, counsel proceeded to say, had tried to struggle out of the Ulster custom, and the Act of 1870 actually made the Ulster tenant-right the law of the land. Nothing could appear more unreasonable to a Southern landlord than to say that he would have to pay £700 to get possession of his farm from his tenant, but that would be quite reasonable, usual, and proper in the North; and the consequence was that it sprung up and became part of the law of the land apart from the fixing of fair rent altogether. The tenant in the North had his tenant-right; and if the landlord did not choose to buy, the tenant could insist on his allowing him to sell it to some one else. As he had already said, they had nothing to do with a question of policy; but in the terms of the Act of Parliament they relied on the Judgment of Lord Chancellor Law in the case of *Adams v. Dunseath* as showing that in the case of the Ulster tenant-right all the improvements and all the enhancement of the value must be credited to the tenant.

In conclusion, Sergeant Hemphill contended (1) that the improvements were made by the tenant; (2) that the

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original improvability of this land was of the lowest character ; that it was land that, without the application of the capital and labour of the tenant, would to that hour have been worth 2s. 6d. per acre, and that that element should be considered by their Lordships when they came to measure the rent which the tenant had now to pay ; (3) that the improvements made had enhanced the rent from what it would have been originally, from 2s. 6d. to 5s. per acre, up to its present letting value ; that no rent should be charged on that enhancement, which had resulted from the tenant's improvements ; that the valuation of the Court valuers should be no guide or exercise, no influence over their Lordships' judicial mind, because it was on a false principle, based as it was on the valuation of the land itself as a farm abstracted from the consideration that there were on that land the valuable houses and offices built by the tenant.

MR. ROSS, Q.C., then argued the case on behalf of the landlord. He said he would repeat what he said on a previous occasion, that a more ordinary common case could not be conceived. He had been in many cases for landlords and tenants, and he did not remember any case which afforded less ground for legal disquisition than the case in which they were engaged. The facts were that the tenant got a lease in 1853, which expired in 1880, or thereabouts. From that time up to the present year the tenant did not come into Court. The old rent was £29 os. 8d. ; and it would have continued so in the ordinary course supposing there had been no Land Acts. A tenant-right would have sprung up. The land would have been developed, and the improvability of soil increased. As a consequence an increased rent would have to be paid, while in the Court it had been reduced from £29 to £21. That was the reason the landlord appealed, and the other side had also appealed for reasons which were not quite so clear. In the

evidence of the Court valuer and others they were told that the farm had been very much improved, and that credit had been given to the tenant for all the improvements he proved to their satisfaction. The learned Sergeant contended that the land in uncivilized times was worth 2s. 6d. per acre. He went to a shilling, and finally to a penny, an acre. Was the learned Sergeant seriously asking that it ought to be deemed that everything that had been done from this remote period belonged to the tenant? Was Sergeant Hemphill there to go back to what was called prairie value—in the most extreme form?

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In the case of *Adams v. Dunseath* the Lord Chancellor had held that there was no tenant-right custom proved in the case of David Adams; but, while it was not so, he held that the tenant of such a holding had always the right to sell the holding as it stood with its improvements. Lord Justice Sullivan, in one part of his Judgment, was of opinion that the Act of 1881 did not confer the absolute right of sale upon the tenant. Continuing, Mr. Ross referred to the practice prevailing in Ulster tenancies, and mentioned that in the revision of rents which occurred at the lapse of leases, it scarcely ever happened that the rent was reduced. What happened on the Abercorn estate was that experienced valuers were sent independently to the holdings. They returned the valuation, and where a large difference existed they were ordered to review their valuation. In no instance had the tenant been charged any rent for house or offices. The rent arrived at would certainly never be lower than the former rent, but would not be so excessive as to do away with a fair selling interest in the tenant, or what was called tenant-right.

The argument of Mr. Hemphill was that the tenant's expenditure capitalised should be subtracted from the rent named in the lease. The very essence of tenant-right was that the rent charged by the landlord was less

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than the fee-simple value. It was thought that the tenant-right was created in consequence of the landlord permitting the farm to be held at less rent than if it were in his own hands. According to the evidence given by the tenant's valuers, there would be no tenant-right. The greater the value of the fee-simple and the less the rent charged by the landlord the greater was the value of the tenant-right. The rent of £29 under the lease must have been a fair rent to give any tenant-right at all, and it must have been less than the value of the land had it been in the landlord's hands. If the gross value now was less than the rent, would there be an interest at all? The 1st section of the Act of 1870 provides that a tenant who took advantage—or who was entitled to do so and did so—of the tenant-right Ulster custom clause was not entitled to compensation under any other section. The tenant was obliged to take the Ulster custom as a whole. What was the custom? It was that the tenant was to be allowed to sell subject to a fair rent—that was a rent that would not encroach upon his interest. Continuing, counsel quoted from Judgments of Mr. Justice O'Hagan, in which a fair rent was described as being "dependent upon the evidence of skilled men acquainted with the country and the custom." In another case the learned Judge had said that to get a fair rent the value of tenant-right should be taken into account, and a fair rent fixed upon the remainder. He (counsel) submitted that was the only intelligent way in which it could be done.

Another contention was that the whole system of valuing tillage lands was erroneous, since the buildings were not included; but was it not possible to value a farm without including the buildings? Sir R. Griffith's valuation was apart from the buildings. He (Mr. Ross) said that the proposed including of buildings in the valuation was absurd. The landlord might say—I gave

him the land on which the building is erected. The essence of Ulster tenant-right was to remain on at a rent that would not confiscate the tenant's interest. He did not propose to go through the evidence, as it seemed to be a very ordinary case. None of the old lease tenants on the Abercorn estate had their rents reduced. He submitted that the old rent of £29 was a fair one, and should not be reduced.

SERGEANT HEMPHILL, in replying, said Mr. Ross had, in the course of his argument, appealed to the Court valuer's report as a fair rent. That report, however, failed, and he invited their Lordships' consideration to the point that that report was defective in not reporting to the Court what in the opinion of the valuer was the full value of the holding as it stood. It did not either specify what was the capital of the improvements that were wrought on the land by the tenant and his predecessor, which he confessed would be extremely satisfactory for landlord and tenant. The report did not state the principle on which the fair rent had been fixed, or what allowance the valuer had made on the improvements. His learned friend on the other side left it out of sight that the Act conferred on the Ulster tenant the same rights that every other tenant had under the Act—viz., to have a fair rent fixed against the landlord, no rent to be charged on the tenant's improvements. If the Duke of Abercorn had purchased the tenant-right without interest on the money that had been expended by the tenant, the Duke of Abercorn would have been out of pocket some £20 a-year, according to the rate of interest charged on that outlay.

The Court on the conclusion of the arguments withheld their decision; and subsequently on the 13th December, 1895, Mr. Justice Bewley delivered the following Judgment of the Court:—

BEWLEY, J.—The holding in this case consists of part of the townland of Crew, Lower, on the Abercorn

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estate, in the county of Tyrone, containing 40 acres, statute measure, and is held under a tenancy from year to year, at the yearly rent of £29 9s. 4d. The Ulster tenant-right custom prevails on the estate, and but for the eminence of the counsel, and the extravagance of the endorsement on the tenant's originating notice, the case might be treated as one of a very ordinary character.

The schedule of improvements endorsed on the originating notice in some particulars scarcely deserves serious notice. The total amount claimed for improvements on this comparatively small farm is £2,095, and includes a bulk sum of £1,000 described as "Contribution towards the construction of roads for access to markets, and churches, and neighbours' residences; towards county buildings and the administration of justice, and preservation of the peace; towards the maintenance of the poor, and generally towards the creation of a settled and progressive district, whereby substantial value was given to the holding."

As pointed out by the counsel for the landlord on the hearing, although out of the 48 acres constituting the holding, 2 are unreclaimed land, this schedule claims that the tenant is entitled to credit for the reclamation at different periods of 40 acres, 8 acres, and 2 acres, *i.e.*, of 50 acres out of a possible 461; and at the foot of the schedule after this formidable total of £2,095, which, I may observe, would be equal to a little more than seventy years' purchase of the old rent, the tenant claims "that no rent should be allowed or made payable in respect of such improvements, and that the rent fixed shall represent merely the fair value of the soil of the holding as if it, and the other holdings in the district, had not in any way been improved."

It is right to state, however, that the very able and distinguished counsel who argued the case for the tenant, though leaving nothing unsaid on any matter

fairly open to argument, did not attempt to support the extreme claims referred to, and practically ignored this extraordinary indorsement of particulars of improvements. In the closing passage of his argument he—somewhat hesitatingly, as it seemed to me—suggested that the fact that the tenant had in past years paid all the county cess, which was applied for the making of roads, and for other public purposes, ought to be taken into consideration in fixing the rent; but no serious argument was addressed to us on the subject.

If we went into an inquiry as to the application of the county cess paid by the tenant, we should, I suppose, investigate to what extent the rent received by the landlord was applied by him for the promotion of railways, or for purposes that might indirectly benefit the holding or the district. But such matters appear to me to be entirely outside the “circumstances of the case, holding, and district,” to which the Court is to have regard in fixing a fair rent; and this contention does not seem to require any further notice. The liability of the tenant to pay the entire of the county cess without any right of deduction, has, of course, been taken into account.

The holding is a tillage farm of poor land, and the buildings, consisting of a thatched dwelling-house, and a good range of slated offices, were erected by the predecessors in title of the tenant. The Sub-Commissioners and Court valuers, according to their usual practice, valued the lands independently of the buildings, and as the latter had been erected by the predecessors in title of the tenant, they did not assess them with any part of the judicial rent. It has been strenuously urged, however, on behalf of the tenant, that the farm being a tillage one, the existence of suitable buildings is a necessary element in the valuation of the lands, and that, under the circumstances, the Sub-Commissioners ought to have deducted an annual sum in respect of the

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buildings. But over the whole of Ireland—north, south, east, and west—all the valuers who give evidence before the Land Commission, whether for tenants or landlord, value the lands in a holding apart from the buildings, and in estimating a fair rent, add an annual sum in respect of the buildings, if they are the property of the landlord, and place no rent on them if they were erected or acquired by the tenant.

I pointed out, in the course of the argument, that all the tillage lands in Ireland have been valued for the purposes of the tenement valuation separately from the buildings, under the instructions issued by Sir Richard Griffith; and, so far as I am aware, it has never been suggested that there was any difficulty in doing so.

This is a question of valuation and not of law, and I see no reason why the system at present adopted throughout Ireland should not be correct.

In our opinion, the Sub-Commissioners were right in not making any deduction in respect of buildings, having regard to the method of valuation which prevails in this country. If such a deduction were to be made, the acreable valuation of the lands would, no doubt, have been increased.

In dealing with improvements in respect of which the tenant is entitled to be exempted from rent, some propositions of a general character in reference to the presumption as to the making of improvements in Ulster tenant-right cases, were discussed by the counsel for the tenant; but it appears wholly unnecessary for us to do more than dispose of the questions that arise in the present case. It is admitted on behalf of the landlord that all the visible improvements on the holding, such as the buildings, fences, and farm roads, have been made by the tenant or his predecessors in title; and it is further admitted that the tenant is entitled to be exempted from rent in respect of all such improvements in the nature of drainage and reclamation as

have been proved to have been actually effected. No doctrine of presumption, therefore, need be called in aid with regard to any of these improvements. But I may state that, in my opinion, there is no general presumption either of law or fact in the case of an Ulster tenant-right holding, or any other holding; that the entire holding was waste land when it was originally let to a predecessor in title of the tenant; nor that because one part is proved to have been reclaimed, the whole must have been reclaimed by the tenant or his predecessors. Such a presumption would, in most cases, be directly contrary to the facts.

In the present case a substantial amount of full reclamation and some partial reclamation have been proved; and the reclaimed land is of such a character that without careful tillage it would revert to its original condition. All this has been taken into consideration by the Sub-Commissioners and the Court valuers, with the exception, as it appears to us, of some partial reclamation effected by the predecessor in title of the tenant. At the time the order of the Sub-Commission was made, it was not the practice to state on the face of the report of the Sub-Commissioners the capital value of the tenant's improvements exempted from rent, and the allowance made in respect of them in fixing the fair rent. Since September, 1894, the practice on this point has been altered, and this information now appears in the reports.

The improvements taken into consideration include reclamation and the making of an embankment, fences, farm road, and drains, and the removal of rocks and stones. It was submitted that any increased letting value arising from the tenant's improvements in this case should be deducted from the fair letting value of the holding as it stands in ascertaining the fair rent. It is hardly necessary to state, as was indeed admitted by Mr. Hemphill on behalf of the tenant, that the often-

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cited case of *Adams v. Dunseath* (10 L.R.I., 109) does not afford any assistance on this point. Five questions, and no more, were decided in that case, as can be seen by anyone who reads the report in 10 L.R.I., or the Order of the 20th February, 1883, made by the Land Commission on the return of the case stated for the decision of the Court of Appeal, and these did not involve any consideration of increased letting value. Several of the Judges in the course of their Judgments referred incidentally to the increased letting value arising from tenants' improvements; but the question was not discussed as a matter then arising for decision, and there was a remarkable diversity of opinion amongst the members of the Court on the subject.

In the present case the allowance made by us in respect of the tenant's improvements is, in our opinion, amply sufficient to cover any increased letting value attributable to the improvements, and consequently no question arises as to the allocation or apportionment of increased letting value over and above this allowance.

In fixing a fair rent of a holding subject to the Ulster tenant-right custom, the existence of the custom has been from the earliest days of the Land Commission an important element to be taken into consideration; and in the present case it was necessarily taken into account by the Sub-Commissioners, and the fair rent fixed at such an amount as, in their opinion, would not infringe the custom.

We do not consider it desirable, nor indeed possible, to attempt to propound a formula applicable to all cases for determining the manner in which the question of tenant-right in such cases is to be dealt with, and it is remarkable that the valuers for the tenant, who might naturally be expected to give us full materials for fixing a fair rent, and had the same opportunities of examining the holding as the Sub-Commissioners, did not express any opinion as to the allowance to be made by reason

of the existence of the custom, nor as to the increased letting value attributable to the tenant's improvements.

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It is to be observed also that, although stating that in making their valuations they had taken into account the fact that the farm was equipped with suitable buildings, they have made no suggestion as to what deduction, if any, should be made from their valuation of the land in respect of the buildings.

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We have fully considered all the evidence in the case and the arguments of counsel, and are of opinion that, in addition to the improvements referred to in the report of the Sub-Commissioners, the tenant is entitled to be exempted from rent in respect of some partial reclamation done by his father, for which no allowance was made by the Sub-Commissioners or Court valuers. Having taken all the circumstances of the case into consideration, we now fix the judicial rent at £19.

[Not reported.]

NOTE.—See *Porter v. Duke of Abercorn*, October 12, 1895, *ante*, p. 535.

SUB-COMMISSION.

(Before BAILEY, A.L.C.)

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Carson v. Molyneux.

Ulster tenant-right custom—Interest of the tenant under—Buildings not suitable to holding—Land Law (Ireland) Act, 1881, section 8—Landlord and Tenant (Ireland) Act, 1870, section 71—Buildings erected by the tenant or his predecessors in title on a holding

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subject to the Ulster tenant-right custom are not liable to rent, even when they are not "suitable to such holding," being part of the interest of the tenant in such holding.

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Robb v. Marquis of Downshire (unreported) distinguished.

Bailey, A.L.C.

The facts appear in the Judgment.

BAILEY, A.L.C.—This is a holding of 5 acres, 1 rood, and 5 perches, at a rent of £5 16s. a-year. The poor-law valuation is £11 15s., of which £5 15s. is on the buildings. On behalf of the landlady it is contended that the dwelling-house on the holding is not suitable to a farm of the size—in fact, it is too good for the holding—and, consequently, that rent should be imposed on it, although admittedly it was built by the tenant. This claim is made on the authority of Mr. Justice Bewley's decision in the case of *Robb v. Downshire* (not reported), in which it was laid down that where the improvements were not suitable to the holding rent should be put upon them, even though proved to have been made by the tenant. This decision, of course, was based on the definition of the word "improvements" in section 71 of the Landlord and Tenant Act of 1870. The important question arises, Does the principle of this decision apply to the Ulster tenant-right custom? The holding here is proved clearly to be subject to the Ulster custom. Mr. Fullerton, the agent, was examined, and admitted that the holding, and the estate of which it is a part, is under the custom, which allowed the tenant to sell his holding with the improvements thereon for his own use. Now, it has never been the practice in such cases to put any limit on the class of improvements which a tenant might sell under his tenant-right. No landlord ever claimed that any buildings or other works made by the tenant should be excluded from such tenant's right of sale. So far as I am aware, it was never laid down, when giving

the compensation payable to a tenant for breach of the custom under section 16 of the Act of 1870, that any class of work done by the tenant should be excluded from consideration.

In fact, the right of the tenant to all improvements found to exist on the holding was generally admitted. Not alone were all improvements on the holding considered to be the property of the tenant, so far as their cost was concerned, but "the entire of the increased letting value caused by such improvements was also the property of the tenant" (see Chief Baron Palles's Judgment in *Adams v. Dunseath*, M'Devitt, p. 57). "The foundation of the Ulster tenant-right is the liability on the part of the landlord to pay the full value of the holding upon an eviction in breach of the custom" (*ibid.*, p. 68). "The tenant of such a holding," said Lord Chancellor Law, "has always had the right to sell it as it stood, with its improvements on it" (M'Devitt, p. 31). "His right was to sell his holding, improvements and all, and that for his own absolute use" (p. 37). So, also, where an Ulster custom tenant claimed, under section 16 of the Act of 1870, against a landlord for a breach of the custom, as legalized by section 1 of that Act, the right of the tenant to any improvements (using the word in its ordinary, not in its statutory, sense) made by him was admitted. The landlord's "right to an increase of rent depended on the intrinsic value of the land, altogether irrespective of the improvements which had been effected by the tenants" (*Carraher v. Bond*, 6 I.L.T.R., 19; Donnell's Reports, 319). This principle was further illustrated by the decision that a landlord was bound to pay under the custom what a solvent tenant would give for the farm. This was laid down by Chief Justice Monahan in the case of *Johnston v. Patton*, post (5 I.L.T.R., 159; Donnell's Reports, 178), at Omagh in 1872. His words were: "The question was, what would a respectable, solvent man, wishing for the farm, be prepared to

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 Bailey, A.L.C. pay for it?" That, according to the Chief Justice, was the measure of the landlord's liability where he was held liable for a breach of the custom. It is evident that a respectable, solvent man would give more for a holding on which the tenant erected a good, substantial dwelling-house, as in this case, even though that house might be held to be in excess of the mere requirements of the holding. The Act of 1870 contains the definition of the word "improvements." That definition is: "any work which being executed adds to the letting value of the holding on which it is executed, and is suitable to such holding."

Now, the definition governs and limits the operation of sections 4 and 5 of the Act of 1870, and all other sections in the Act dealing with improvements. But it must be remembered that the sections which deal with and legalize the Ulster tenant-right custom, do not mention the word "improvements." The compensation to be awarded for breach of the custom was not limited by this word "improvements;" it had reference to the interest of the tenant, which was something wider and larger than mere compensation for improvements. Sections 4 and 5, which dealt with improvements claimed by the tenant, do not apply to tenants who claim the benefit of the custom. It might, indeed, be plausibly argued that the definition of the word "improvements" in section 71, does not at all affect Ulster custom holdings, even under the Act of 1870. Now, when we come to the fixing of a fair rent under the Act of 1881, do we find anything which obliges us to place rent on any works adding to the letting value of the holding, which have been made by the tenant? Section 8 (9) says that no rent shall be allowed or made payable in respect of improvements made by the tenant or his predecessor in title. Now, even if the word "improvements" in this sub-section concerns Ulster custom holdings at all, it merely provides that

such works as come within the meaning of that word shall be exempted from rent. But sub-section 1 of the same section, which deals generally with the fixing of a fair rent, lays down that such fair rent shall be determined by the Court after "having regard to the interest of the landlord and tenant respectively, and considering all the circumstances of the case, holding, and district."

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Now, as I have pointed out, all works done on the holding by the tenant are, where the Ulster custom exists, part of his "interest." Even if the house on this holding is too good for the holding—if it would only partially come within the definition in section 71 of the Act of 1870—that part of it which is outside the definition, and which would be rented under the decision in *Robb v. Marquis of Downshire*, is here part of the interest of the tenant, and must be regarded by us in determining the fair rent. Nothing in section 8 gives any part of this house to the landlord. The rule deduced from the Judgment in *Adams v. Dunseath*, that the right to exemption from rent is coterminous with the right to obtain compensation for improvements, does not apply to this or any Ulster holding. We accordingly are of opinion that Mr. Monroe's contention fails, and that there is no reason why we should put rent on any part of the house built by the tenant. This case helps to show the great importance, even at the present day, of the Ulster tenant-right custom—an importance which many in this province are inclined to forget or minimize. The judicial rent we fix at £4 5s.

An appeal was taken from above decision, but was withdrawn.—Irish Land Reports, 1896, 236.

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December 18,
1896.

LAND COMMISSION.

(Before BEWLEY, J., FITZGERALD, Q.C., and LYNCH,
Commissioners.)

Wilcox v. Slacke.

*Land Law (Ireland) Act, 1881—Notice of tenant to sell—
Ulster custom—Application by landlord to declare sale
of the tenancy under the Ulster custom void.*

Bewley, J. BEWLEY, J.—We are clearly of opinion that it is not in the power of the tenant, having elected to sell under the Act, and having received an originating notice of the intention of the landlord to apply to fix the true value, to withdraw his notice, and to sell under the Ulster custom. The sale had must be set aside with costs.

[Not reported.]

Sub-Com.
January 12,
1897.

SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Vance v. Harrison.

*Endorsement of improvements—Rules of the Irish Land
Commission—Claim under the Ulster custom.*

Bailey, A.L.C. BAILEY, A.L.C.—The endorsement on the originating notice did not comply with the rules of the Land Commission as to setting forth particulars of the various improvements relied on. The holding was subject to the Ulster tenant-right custom. I am of opinion, and

have always ruled, that the tenant of a holding subject to the Ulster custom is entitled without proof to all improvements found to exist on the holding—that, in fact, such improvements are presumed to have been made by him or his predecessor in title.—*Boyle v. Richardson, post* (I.L.T. Reports, 1894). The tenant of such a holding was, and is, entitled to sell the holding, sometimes subject to certain restrictions, with all the improvements thereon. The landlord never claimed the benefit of such improvements, unless he was able to prove that he had made or acquired them. This being so, the improvements evident on the holding, as, for example, the buildings, the fences, and the farm roads, are always credited to the tenant without proof. If we interpret the rule (No. 129, rules of September 11, 1896) which provides for an endorsement on the originating notice of the particulars of any improvement which are intended to be relied on by the tenant as having been made by him or his predecessors in title, as applying to and comprising the tenants of Ulster tenant-right holdings, we deprive such tenants of a property which the Ulster custom always gave them. We will put them to proof, and oblige them to claim credit for what the presumption under the custom gives them as of right, subject to disproof by the landlord.

To deprive a tenant under such circumstances of his improvements would be on a par with the contention that would exclude from a holding any land which happened not to be included in the area set forth in the originating notice. Section 49 of the Land Act provides that “nothing in this Act contained shall prejudice or affect any right, benefit, or presumption, exercised or enjoyed under or by virtue of the Ulster tenant-right custom, or any usage corresponding therewith.” If we gave the application contended for to the rule providing for the endorsement of improvements, we would certainly prejudice the presumption enjoyed by

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virtue of the Ulster tenant-right custom, and if the rule can only be read as having an application opposed to the 49th section, it would, of course, be *ultra vires*. In the case of non-evident improvements, such as closed drains, the removal of rocks, and such like, the conditions are different. Such improvements must be shown to exist before they can be allowed, and the landlord is entitled to notice that they will be relied on at the hearing. Particulars with regard to this second class of improvements (the non-evident ones) should accordingly be endorsed on the originating notice served by the tenant.

Sub-Com.
June 27,
1894.

SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Boyle and others v. Richardson.

Ulster tenant-right custom—Presumption as to ownership of improvements—Proof of different classes of improvements.

When a tenant claims credit for the making of improvements which affect the productive capacity of the soil without being self-evident—such as drains, reclamation, etc.—such improvements must be proved to exist.

Application to fix a fair rent.

The question was raised as to the right of the tenants to be allowed for improvements the making of which was not proved. The remainder of the case is not of legal importance.

Bailey, A.L.C. BAILEY, A.L.C.—The general rule of fact in Ulster custom cases is that the tenant is entitled to credit for

all improvements which are found to exist on the holding. In all cases the *presumption* is that the improvements have been made by the tenant or his predecessor in title, and that the onus lies on the landlord of showing the contrary. It is, however, one thing to presume the ownership of improvements, and another thing to show that they exist; consequently in Ulster custom cases a marked distinction has to be drawn between the two great classes of improvements—viz., those which add to the value of a holding as an equipped farm, and, secondly, those which actually affect the productive capacity of the soil. In the first class there are included buildings, fences, and farm roads; in the second, drains, reclamation, and tillages. The first class of improvements are part of the general equipment of the holding, and are evident to all comers. In Ulster custom cases, the presumption as to the ownership of improvements being in favour of the tenant, all improvements of this class—namely, houses, fences, and farm roads—which are found to exist on the holding, are without any proof presumed to be the property of the tenant, and should be exempted from rent unless proved to be the property of the landlord. As regards the second class of improvements, although a similar presumption exists as to their ownership, in practice a different procedure has to be applied. Drainage and reclamation are not self-evident in the majority of cases. As to whether drains exist in a certain field, or whether a particular piece of land has been reclaimed, is a matter of evidence; consequently in this (second) class of improvements—those that affect the productive capacity of the soil without being self-evident—some proof must be furnished that these improvements exist before the presumption as to ownership can be applied, and before credit can be given. Once, however, it is shown that they do exist, then the presumption arises, and it is not necessary that the tenant should show that he or his predecessor in title

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has made them. This rule is in actual practice largely affected and limited by the rule of the Land Commission which requires a tenant to endorse on his notice the particulars of any improvements in respect of which evidence is intended to be produced, or which are intended to be relied on by the tenant, as having been made by him or his predecessors in title.—I.L.T.R., vol. xxviii., 153.

Appeal.
May,
1893.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before WALKER, C., SIR PETER O'BRIEN, J.,
FITZGIBBON and BARRY, L.JJ.)

Hewson v. Listowel.

This was an appeal by Mr. Hewson from a decision of the Land Commission Court, dismissing his originating notice to have a fair rent fixed, on the ground that the holding consisted of demesne lands. The farm is situate near Listowel. Walker, C., said that from the fact that the land had been let to Mr. Hewson for farming purposes, that he had used it for farming purposes, and in no other way, he (the Lord Chancellor) came to the conclusion that the lands were not demesne lands. He, however, did not wish it to be understood that he considered that at no time were they demesne lands, but that because of the dealings between Lord Listowel and Mr. Hewson they had been undemesned. There was enough in the evidence to turn the scale in favour of the tenant, and the decision should be in his favour. Lord Justice FitzGibbon said the case raised the point as to whether it was impossible

to undemesne land, and this was the first occasion in which they held that such an operation had taken place. He concurred in the decision of the Lord Chancellor. Lord Justice Barry, concurring, observed that the fact that the land at one time had been demesne land did not make it impossible to undemesne it. The case was remitted to the Land Commission to fix a judicial rent.
[Not reported.]

Appeal.
May,
1893.

Hewson
v.
Listowel.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

Appeal.
November 18,
December 18,
1894.

(Before WALKER, C., SIR PETER O'BRIEN, C.J.,
and FITZGIBBON and BARRY, L.JJ.)

Cheevers v. Fallon.

Land Law Act, 1881—Demesne land—Severance of portion of the demesne—User as agricultural land for over fifty years.

By lease, dated the 14th November, 1788, W. D. demised to H. S. "the house, offices, and demesne of P., with the farm and lands of G.," containing 156 acres, 2 roods, Irish plantation measure, for three lives, with a covenant for perpetual renewal. This lease was renewed, and the lessee's interest became vested in C., the tenant.

By sub-lease, dated the 21st November, 1794, portion of these lands was demised by H. S. (the lessee) to W. D. (the lessor), described as "the farm and lands of C., and part of G., otherwise P., and now called Fairy Hill," containing 83 acres, for three lives, with a covenant for perpetual renewal, at the rent of £100 5s. This lease was renewed, and subsequently became vested in C., the tenant.

Appeal.
November 18,
December 18,
1894.

Cheevers
v.
Falton.

By sub-lease, dated the 6th May, 1805, portion of these lands was demised by W. D. to H. D., for three lives, with a covenant for perpetual renewal, at the rent of £26 1s.; and this portion of the lands was described as "that part of the demesne of Fairy Hill, bounded on one side by the high road leading from P. to E.; on another side by the road or avenue from the said high road to the house of Fairy Hill; on another side by the said demesne of Fairy Hill," containing 19 acres and 21 perches, Irish plantation measure. The lease contained a covenant not to build any house or cabin on that part of the demised premises adjoining the said road or avenue leading from said high road to the said house of Fairy Hill, nor within fifty yards thereof.

The lease, having subsequently, by eviction or otherwise, become extinguished, T. D. (the successor in title of W. D.), by lease dated the 9th October, 1840, demised this holding of 19 acres, 21 perches, to J. F., for three lives, with a covenant for perpetual renewal, at the rent of £16. The lands were described in the same way as in the lease of the 6th May, 1805, and the lease contained the same covenants. On the 24th October, 1846, J. F. made a lease to a tenant for ten years, at £44 1s. 5d., and after its expiration the holding was let to different tenants; and, finally, on the 23rd May, 1880, C. entered into an agreement with F. to become a yearly tenant of the 19 acres, 21 perches, at a rent of £1 17s. 6d. an acre, and agreed not to break up or conacre any part of the holding. C. had previously acquired the interest under the lease of the 14th May, 1788, and he subsequently acquired the interest under the lease of the 21st November, 1794, and on these portions of the lands the mansion-house stood in which he resided. He was a gentleman of good social position, and worked all the lands together.

Held (reversing the decision of the Land Commis-

sion, FitzGibbon, L.J., *dissentiente*), that the 19 acres, 21 perches, had become detached from the other portion of the demesne of Fairy Hill by the leases of 1805 and 1840, and had become undemesned.—I. R., 1895, vol. ii., 407.

Appeal.
November 18,
December 18,
1894.

LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Land Com.
December 19,
1895.

Stitt v. Hamilton.

*Redemption of Rent (Ireland) Act, 1891—Lands described
as Demesne Lands.*

BEWLEY, J., having explained that the tenant held under a fee-farm grant made under the Renewable Leasehold Conversion Act, said—In the lease, which was dated September 5, 1787, the premises demised were described as dwelling-houses, offices, buildings, plantations, and demesne lands, and the same description was followed naturally in the renewal of that lease in the fee-farm grant, which was dated 25th June, 1856. Now, when they came to investigate what the actual condition of the lands were, they found that the holding was an ordinary agricultural farm, with no traces whatsoever of the characteristics of a demesne. There was nothing in the nature of a plantation or ornamental grounds. There were only two or three old trees, and there was nothing in the nature of demesne walls. It was simply used as an ordinary farm. Now, of course, in some cases, and indeed in many cases, this description of demesne lands had been relied upon as an important circumstance, especially when it occurred in deeds executed long prior to the passing of the Act of 1870

Bewley, J.

Land Com.
December 19,
1895.

Stitt
v.
Hamilton.

or any Act which made it in the interests of any person to describe lands as demesne lands. His Lordship quoted a number of cases in which the question of what constituted demesne lands had been decided, and, proceeding, said that here they had demesne lands simply on paper. They found nothing now to show that these lands within living memory were demesne, and they were clearly of opinion that at the time of the passing of the Land Act of 1881 and the subsequent Redemption of Land Act of 1891 the lands were not demesne. Under those circumstances they thought the Sub-Commission were right in fixing a rent. The old rent was £133 18s. 1d.; the judicial rent was fixed at £110; the Court had on the evidence before them fixed it at £116.
[Not reported.]

Land Com.
December 8,
1896.

LAND COMMISSION.

(Before BEWLEY, J., and FITZGERALD, Q.C., Commr.)

Cleary v. Daly.

Land laws—Demesne land—Undemesning—Onus of proving that land was demesne when let, and was intended to be preserved as such—Land Law (Ireland) Act, 1896, s. 5 (1); (b) 11.

The onus of proving that the holding consists of "land which when first demised was demesne, and which the provisions of the contract of tenancy or the circumstances of the case show was intended to be preserved as demesne, or resumed as demesne by the landlord," lies on the landlord.

Appeal by the tenant from an order of the Civil Bill Court of the County of Tipperary, dated June 24, 1896, dismissing an application to have a fair rent fixed, on the ground that the holding was demesne land.

The holding, which contained 75 statute acres, or thereabouts, formed part of the townland called Thomastown Demesne, in the barony of Clanwilliam and county of Tipperary, and was held under a tenancy from year to year, at a yearly rent of £70 12s. 4d.

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December 8,
1896.

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v.
Daly.

The remaining facts are stated in the Judgment.

BEWLEY, J.—The demesne lands of Thomastown appear to have originally comprised over 2,000 statute acres. In the year 1837 they were the property of Lady E. Matthew, heiress of the Earl of Llandaff, and a map or survey prepared in that year by Messrs. Brassington and Gale, the well-known firm of surveyors and valuers, has been given in evidence. This map, taken in connection with the parol evidence, would certainly lead to the conclusion that the holding before the Court was at one time part of the demesne. But even in 1837 a very large portion of the demesne lands outside what is termed the Home Division on the map was in the hands of the tenants.

Bewley, J.

Under the provisions of section 58, sub-section 2, of the Land Act of 1881, demesne land was excluded from the rent-fixing provisions of the Act, and questions frequently arose as to whether land originally demesne which had come into the occupation of tenants had been what is termed in popular language "undemesned." To undemesne, there should be a clear intention to do so evidenced by the terms of the contract of tenancy or the acts of the landlord, and the landlord should have a sufficient estate in the lands to enable him to deprive them of their demesne character.

The provisions of the Land Act of 1881 as to demesne land have been repealed by the Act of 1896, and other provisions substituted by section 5, sub-section 1 (*b*), of the latter Act. These provisions, by virtue of section 50, sub-section 1, of the Act of 1896, apply to the present proceedings; and the onus, therefore, lies on the landlord to prove that the holding, in the language

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of section 5, sub-section 1, (b) (ii), of the recent Act, substantially consists of "land which when first demised was demesne, and which the provisions of the contract of tenancy or the circumstances of the case showed was intended to be preserved as demesne or reserved as demesne of the landlord."

The holding in this case is separated by a country road from the Home Division or residential portion of Thomastown demesne. The title to it of the present tenant is derived by marriage with the daughter of Wm. Green, a former tenant. The existing tenancy must have subsisted for at least half a century; and there is no evidence of the circumstances connected with its creation. Several old witnesses were examined on behalf of the tenant. Most of them state that Wm. Green was in occupation of the holding when first they recollect it, and they all agree that the holding was never in the occupation of any person living in Thomastown mansion-house.

Neither the present landlords nor their predecessor, Lord Dunsandle, ever occupied the mansion-house or Home Division of the demesne. The late Count de Jarace lived there for many years.

Assuming that the holding in the present case when first demised was demesne, the landlords have failed wholly to establish that the provisions of the contract of tenancy or the circumstances of the case show that it was intended to be preserved as demesne or resumed as demesne by the landlord.

The order of the Civil Bill Court must be discharged, and the case remitted to proceed pursuant to the statutes.—I.L.T.R., vol. xxx., 170.

LAND COMMISSION.

Land Com.
February 26,
1897.(Before BEWLEY, J., FITZGERALD, Q.C., and
O'BRIEN, Commissioners.)**Furley v. Mahon.***Land Laws—Act, 1896—Section 1 (1); section 50—
Schedule—Mode of valuation, etc.*

O'BRIEN, COMMISSIONER.—When fixing fair rents, we have now to frame a schedule in accordance with the 1st section of the Land Law Act, 1896, as explained by the Judgment of the Court of Appeal in *Cope v. Cunningham*. If the materials are fully given to us in the official reports and evidence, the process of calculation required is rational and possible, viz., to estimate the fair letting value of the holding as it stands, ascertain and enumerate all the improvements on the parcel of land, assign these to each party according to their legal ownership; those belonging to the landlord being described, and their value included in the estimate of the holding, under sub-head (*a*), being the fair rent, inclusive of all improvements; those belonging to the tenant being enumerated, described, capitally valued, and the tenant credited with his interest in them. This record, Lord Justice FitzGibbon pointed out, is to be evidence for all time, and it should, therefore, be true, full, and exhaustive. The landlord has a right to know what improvements are credited to the tenant and the value assigned to them; the tenant has an equal right to know specifically by description and quantity what improvements are credited to the landlord. The Court is directed in section 1 to ascertain the improvements; the process of ascertainment includes personal examination of the farms by lay commissioners and Court

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valuers. Visible improvements, such as buildings, fences, gates, farm roads, planting, open drains, clearance of natural and unprofitable vegetation, most reclamations, and many other works, prove themselves by their manifest existence to the intelligent and trained observer. These, as well as improvements not visible, but ascertained by evidence, should be enumerated and described not vaguely, but specifically, numbers and measurement in lineal or square measure being given, and the definite quantities ascertained assigned to each party—otherwise the record will be misleading and false, and the process of calculation explained by the Court of Appeal impossible.

But for this comparatively simple process of fair rent calculation the Land Commission schedule substitutes an elaborate set of queries, which, in my opinion, cannot be truly answered. Many of the questions are not required by the terms of the 1st section, and, therefore, the difficulty of making up a clear and true record is largely created by the Land Commission itself. To some of the questions I hold it is impossible for a rational man to give any true answer. They are unnecessary, embarrassing, and calculated to prevent a clear issue being presented for decision. Instead of asking the inspecting officials, whose opinion in most cases we adopt as our own, to give an estimate based on their experience of value in the locality, they are required to proceed by a method of imagination to estimate the value of the farm in some hypothetical, undefined position, and then to make additions and subtractions for proximity and remoteness, convenience and inconvenience, and so on. The only solid ground for a competent opinion on value is the valuer's experience and acquaintance with facts and local circumstances. A knowledge of land values near Belfast does not make a man a competent judge of land values at Skibbereen. The value of land in the abstract, apart

from its situation, cannot be truly estimated ; the value due to situation is not a separate amount which can be added or subtracted from the value of land supposed to be vaguely somewhere else. Yet this is what the Land Commission schedule requires. The separation of land and buildings is another example of the hypothetical method : land and buildings constitute the farm ; both are contributory to the production necessary to ensure rent being earned. Farm buildings have no separate annual value without land. Both are used, let, and sold together. Their separation is not required by sub-head (*a*) of section 1. The separation required by the Land Commission schedule is as irrational as it would be to require, in the valuation of a house, separate annual values for the roof, the walls, and the staircases. The rent set upon the buildings must be made out of the produce of the land, and the total fair rent under sub-head (*a*) should not exceed what could be paid for the farm as it stands equipped with buildings ; yet under the Land Commission system it often appears as an addition to this, and it leads, unconsciously perhaps, to the buildings being twice valued, once in the acreable value of the land to which they are contributory, again in their value as an addition to this on the schedule.

The section itself requires an estimate which might be truly given—viz., the present capital value on which an annual value might be assessed. Lord Justice FitzGibbon, in the Court of Appeal, adverted to the practical inconvenience to the Land Commission of ascertaining for itself all the prescribed matters, and intimated that the Land Commission must go through the prescribed process of calculation, and independently exercise their own judgment on them when fixing a rent. “Whether it is difficult or easy,” Lord Ashbourne said, “the law is there, and must be complied with.” To carry this out in the spirit and letter several courts

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of re-hearing would be required to keep abreast of the numerous appeals impending. The greatest difficulty seems to me to be due to the schedule prescribed, and not to the terms of the law. I am, of necessity, bound by the rule *lex non cogit ad impossibilia*, and cannot answer those questions on the schedule, which seem to me absurd and unmeaning, as well as unnecessary.

The process of computation indicated by the Court of Appeal cannot be followed at all unless the official reports give an exhaustive enumeration and full description of all the improvement works on each parcel of land, whether belonging to landlord or tenant, with the quantities and measurement, nor unless the parties in their evidence do the same, the landlord as well as the tenant following the particulars prescribed by the 1st section, so that all improvements may be definitely assigned to one person or the other. In this case there are the necessary fences on the holding; the tenant's evidence was that he made them, but they are not given by the Court valuer's schedule, nor by the Sub-Commission, to either party; nor is there any evidence of their value. The reports do not mention any improvements made or acquired by the landlord, yet if the fences are not specifically given to the tenant, they are necessarily credited to the landlord in the letting value. There is a drainage charge which was not taken into account by the Court valuers, and in this and several other cases their estimate communicated to the parties as a net valuation, with the object of inducing them to settle the case, was misleading and must be dismissed. Both Sub-Commission and Court valuers ascertained and reported that there are $17\frac{1}{2}$ acres of reclaimed bog. That cannot be ignored on the schedule, and should be assigned to either landlord or tenant as an ascertained improvement. It is said that the tenant is precluded from being credited with this improvement because he did not claim it under Rule 130. That rule is a

enactment of a former rule under which it was the practice to reject evidence as to improvements if they had not been claimed by endorsement on the originating notice, and to disallow them for the same reason, even when found on inspection to exist. Even if that practice was legal before the Act of 1896, it does not appear to be so now, for the duty is imposed on the Court of ascertaining the improvements. Until the contrary is proved all improvements are to be deemed the tenant's.

The exceptions to the rule of presumption under section 5 of the Land Act, 1890, have been cut down by section 1, sub-section 10, of the Act of 1896. It rests with the landlord to show that any ascertained improvement for which the tenant is not to get credit comes within the two remaining exceptions to the rule of presumption. If the tenant has to claim and prove everything for which he is to get credit, the presumption as to improvements is in favour of the landlord and contrary to the law. Rule 130 seems to me to conflict with the law, and in such case the law should prevail. On such information as we have I think the fair rent in this case should be £12; but, as my opinion does not affect the result, it is unnecessary for me to say how the record schedule should be framed.

BEWLEY, J.—In this case the old rent payable by the tenant was £22 12s., and on the case having come on before the Sub-Commission on an originating notice served by the tenant, a judicial rent was fixed for £15 10s. The tenant apparently was quite satisfied with that rent, and served no notice of re-hearing. On the occasion of the hearing of the case before the Sub-Commission, no improvements were proved in Court, and no improvements were ascertained by the Sub-Commissioners who visited the lands, to be in existence. I may say now, once for all, that this statement that the rule now requiring that improvements should be specified is illegal, really does not require any serious notice.

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Any Court can require particulars to be given of some of the points in controversy between the parties, in order that the opposite party may not be taken by surprise at the hearing ; and therefore my colleague, Mr. Fitzgerald, and I have no doubt whatsoever that the existing rule requiring improvements to be stated, is not only perfectly legal, but is perfectly reasonable, and that if it were not enforced, great injustice would be done by improvements being alleged, for the first time, on a re-hearing of which the opposite party had absolutely no notice.

Passing now from that, I come to the further stages of this case. The case came on then for inspection by our Court valuers, and, as already stated, they adopted the same course as in the other cases. They did not take the drainage charge into account, not knowing, in the first place, what it was accurately, nor, in the next place, how it was to be dealt with according to law. It appears in this case the drainage charge is a very substantial sum of £2 2s. 10d. a-year, so that the valuation of the Court valuers of £16 10s. would, in reality, be reduced to £14 7s. 2d. a-year. Now, the question of reclamation has been referred to, and I may say that this is a case in which the tenant stated specifically the improvements that he claimed, and he made no claim whatsoever for any kind of reclamation. The Court valuers in classifying the lands described certain portions of the land as wild bog, upon which they put 1s. a-year, and certain other portions as reclaimed bog, upon which they put 3s. a-year. On the examination of the tenant before us he did not allege that he or any of his predecessors in title had ever reclaimed any portion of this bog, and, for all we know, it may have been reclaimed a century before the land came into the hands of the present tenant or his predecessors in title. We cannot make any allowance for an improvement that is neither proved nor claimed, and of the existence of

which there is not a particle of evidence. Under these circumstances Mr. Fitzgerald and I think that the Court valuers' valuation ought to be reduced by the amount of the annual drainage charge. The old rent being £21 12s., and the judicial rent, £15 10s., we now, on the landlord's appeal, reduce the judicial rent to £14 7s.

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SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
Case stated.
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(Before LORD ASHBOURNE, C., PALLES, C.B.,
FITZGIBBON, BARRY, and WALKER, L.JJ.)

Cunningham v. Cope.

NOTE.—This decision being one of importance as affecting the procedure of the Land Commission, and having only been reported on the 27th February, it has been inserted out of its alphabetical order.

*Land Laws—Act, 1896, section 1 (1), section 50—Schedule
—Applicability to cases pending appeal.*

The provisions of sub-section 1 of section 1 of the Land Law (Ireland) Act, 1896, are mandatory on the Chief Land Commission when hearing appeals. The schedule must be filled up in all cases.

Case stated by the Land Commission. For facts, etc., see page 299. The question submitted was as follows:—"Whether the Land Commission on hearing appeals from the Sub-Commission are bound to ascertain

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and record in the form of a schedule the several matters mentioned in section 1, sub-section 1, of the Land Act of 1896."

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ASHBOURNE, C.—The question which we have to decide is whether the refusal of the Land Commission to fill up a schedule under section 1 (1) of the Act of 1896 is valid. Bewley, J., founded his opinion somewhat on the words of sub-section 2 of section 3, and held that the word "Court" in that sub-section applied exclusively to the Court of the Sub-Commission, or the County Court, and not to the Chief Commission when hearing appeals. I am not impressed by that view, because I regard the governing words of that sub-section 2 as providing that the judicial rent shall commence from the gale day next after the date of the application to fix a fair rent. I am unable to follow the contention of the Land Commission that when re-hearing cases they are not to be considered as bound by the intention of sub-section 1 of section 1. [Reads the sub-section.] Must not the words, "Where the Court fix a fair rent for the holding," comprise all the tribunals called upon to hear or re-hear the case? When the case comes up to be re-heard by the Chief Commission, is it not for the purpose of determining the fair rent? The Land Commission must discharge this duty, whether easy or difficult; the law must be complied with. In *Adams v. Dunseath*, 10 L.R.I., 109, it was laid down distinctly that the function and duty of the Land Commission was to fix a fair rent, and so, too, in the case of *Conyngham v. Gallagher*, 22 L.R.I., 614. There is no room for any discretion in the present case. The provisions of the section I regard as mandatory: "The Court shall ascertain and record in the form of a schedule." It is impossible to have more clear or apt words; and then there follow the words "unless *both* landlord and tenant shall otherwise request," so that it must be done unless the parties request otherwise; and then, as further proof

of the mandatory intention of the section, there is the direction to post a certified copy of the record on application by post to each party, and the declaration making the record evidence on mere production from its proper custody. And in sub-section 9 are words of importance bearing on this point, enacting that the only deductions to be made are such as shall be specified in the schedule. The question must be answered in the affirmative.

PALLES, C.B.—I entirely concur. I think in such a case that the rent is fixed by the Land Commission. That was decided in *Kiernan v. Caruth* and *Lewis v. Darnley*, 19 I.L.T.R., 1. Nothing could be clearer than the language of Sir Edward Sullivan in that case. It is idle to speak of an appeal in a case where the Court of first instance and the Court to which the appeal is made are in law one and the same body. Under the Act of 1881 the Land Commission acts through the Sub-Commission, and when there is no appeal from the Sub-Commission, it becomes in law the Land Commission. When the application is made to the Chief Land Commission, it is essentially a *re-hearing*. That element will be found in all the Judgments of this Court, and it is the *ratio decidendi* in the decision to which I have referred, where it was held that a *notice of re-hearing* was not subject to the Treasury Order directing that all notices of appeal should bear a stamp. If the Land Commission had done nothing more than affirm the Sub-Commission, I am of opinion that the Land Commission should have recorded the schedule mentioned in section 1, and that that is an essential condition of the exercise by them of their jurisdiction; in other words, the omission of the schedule is not merely an irregularity, but that it goes to the jurisdiction of that tribunal. And so it would have been if this was only a matter of affirmance. But I am unable to understand the Land Commission when it is set out in the case stated, "Whether the Land Commission on such appeal or re-hearing affirms or

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varies the judicial rent, it does not *fix* the judicial rent within the meaning of the sub-section." But looking at the schedule and the accompanying forms, the scheme of the Legislature is—first, they are to ascertain what would have been a fair rent on the basis of the improvements being the property of the landlord; then they are to ascertain the *fair* rent, and if there is a difference between the two sums, that difference must appear on the schedule. Sub-section 9 enacts that no deductions shall be made except those that appear in the schedule. I do not think the question depends on whether there is a variation or an affirmance. There is no reason suggested why what has been enacted by the Legislature should not be carried out.

FitzGibbon,
L.J.

FITZGIBBON, L.J.—I concur. This, in my opinion, is a plain enactment. The Court which exercises the jurisdiction to fix the rent must ascertain that rent by the process indicated in the particulars which it is ordered to record. It must ascertain and take into account each and every one of the figures and matters that result in the rent, and must record each step of the process by which it has reached the amount fixed. Why should the final Court be exempt from this duty? As the Chief Baron has said, compliance with the section is essential to the jurisdiction to fix a fair rent at all. Beyond all doubt "the Court" necessarily includes the Land Commission. [Reads sub-section 5 and sub-section 9.] Bewley, J., states that the schedule is to be prepared by the Court by which a judicial rent is in the first instance fixed. But I cannot reconcile that view with the decisions of this Court and of the Exchequer. Sir Edward Sullivan, C., described a Sub-Commission as a mere delegation of the Land Commission, which is terminated by the notice to re-hear. If there be any inconvenience in obeying the Act, it is due to the enactment that rents shall not be fixed as fair unless and until the prescribed materials have been

obtained from which a fair rent can be computed ; and if the Land Commission has been fixing rents without those materials, this Act provides that that practice shall cease. Henceforth no rent shall be fixed as fair until the fixing tribunal judicially has, by a process of calculation based on definite materials capable of being specifically recorded, ascertained the amount of that rent, unless both parties otherwise request.

Barry, L.J., and Walker, L.J., concurred.

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NOTE.—This decision was in part reversed by *Mairs v. Lecky*, 452.

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Adams v. Dunseath. Compensation by landlord for improvements, 141.

exemption from rent on account of buildings erected by lessee. Condition against compensation for improvements at end of term. Land Law (Ireland) Act, 1887, section 1. *Held*, that that section merely anticipated the rights which the tenant would have at the expiration of his lease, but did not enlarge them; the tenant was not entitled to compensation for buildings, although only nine years of his term had elapsed. *Clements v. Tighe*, 147.

holding held under lease dated 12th July, 1866, for thirty years, at rent of £61 5s. It was executed before 1870, and contained provisions contracting the lessee out of what would have been his rights under that Act. *Held*, that the lessee was not entitled to exemption from rent in respect of the improvements he had effected, as he could not claim compensation for same on the expiration of his lease. *Warnock v. Orr*, 152.

the executor of a tenant for life whose interest in the tenancy determined by the death of the tenant, was held to be entitled to compensation for improvements, but not to compensation for disturbance. *O'Donovan v. Kenmare*, 153.

where a lease of the year 1811 contained a covenant by the lessee to make certain improvements on the holding, and the tenant applied to have a fair rent fixed, he was deemed to have been fully compensated for such improvements, but holdings subject to the Ulster tenant-right custom were distinguished. *Morgan v. Kilmorey*, 157.

leasehold buildings unsuitable to an agricultural holding. *Robb v. Downshire*, 448.

a grantee under a fee-farm grant of a holding subject to the Ulster custom, is entitled to exemption from rent in respect of buildings and waste lands, but not in respect of drains and fences. *Mairs v. Lecky*, 463.

INTERVENING :

parties seeking for liberty to intervene should do so on notice, but there may be cases where it is more satisfactory to proceed by conditional order. *Jordan v. Gibbs*, 161.

JURISDICTION :

to remove fair rent agreement off the file—fraud. *Evans v. Peyton*, 443.

JUDICIAL TERM:

when an agreement and declaration entered into under section 8 of the Land Act of 1881 have been filed by the Court, the statutory term runs from the rent day next succeeding the filing, and not from any earlier date. *Dunn v. Nettles*, 222. This decision was reversed by the Court of Appeal on 1st March, 1897, after these Reports had been printed.

when a tenant is re-instated under the Land Law (Ireland) Act, 1881, section 20 (2), and at the same time an agreement of the rent to be paid is made, such agreement need not be in writing; nor if in writing need it be filed; hence in such cases a judicial term may come into existence at the date of the agreement. *Dunne v. Nettles*, 222.

LABOURER:

substantial part of holding occupied by labourers not in the employment of lessee. *Held*, not to be agricultural. *Bradley v. Johnstone*, 192.

LANDLORD AND TENANT:

grantee under a fee-farm grant dated 9th February, 1846. *Held*, that relation of landlord and tenant did not exist. Application not within the Redemption of Rent (Ireland) Act, 1891. *Kelly v. Rattey*, 130.

Also Peacocke v. Christie, 302.

LEASE:

lease for more than ninety-nine years determinable on a death—chattel lease—meaning of "expiring within ninety-nine years." *Bangor v. Fitzsimmons*, 274.

expiration of lease—decree in ejectment—new agreement with tenant continuing in occupation. *Wilgar v. Crommellin's Trustees*, 274.

lease by mortgagor after the mortgage, but before 1881, without consent of mortgagee—payment of rent by lessee to mortgagee—recognition of lease by mortgagee. *Roulston v. Caldwell*, 287.

lives renewable for ever—covenant giving liberty to cut trees—evidence of user. *Jeffers v. Byrne*, 71.

for 999 years—Presbyterian manse. *Baily v. Newton*, 83.

lease by limited owner for term of years if lessor should live so long—not within the Act of 1887. *Barton v. Atkinson*, 162.

lease in consideration of a fine for thirty-five years by tenant for life without leasing power. Not within Act of 1887. *Looby v. Finch*, 163.

lease *pur autre vie* limited to heir as special occupant—order fixing fair rent converted interest into personalty. *M'Avoy v. M'Avoy*, 168.

lease for 120 years—fine paid—buildings unsuitable to holding. *Good v. Dunne*, 171.

lease expiring after service and before hearing of originating notice. *Held*, that leaseholder was a present tenant. *Carney v. Arran*, 273.

MIDDLEMAN:

sub-tenancy determined by Judgment in ejectment for non-payment of rent and service of eviction notice—application by middleman to have fair rent fixed before removal of caretaker. *Held*, that the tenant at date of the originating notice was in occupation of the land. *Garnett v. Garnett*, 172.

MILL-HOLDING :

- evidence of Lord Justice FitzGibbon, 7.
- mill on holding of 62 acres. Proviso in lease that if mill burnt, rent should be reduced. *Held*, that the holding was not within the Act of 1881. *Boyle v. Foster*, 174.
- mill on a holding used as an adjunct to the farm and for agricultural purposes. *Held*, to be an agricultural holding. *Irwin v. Goodlate*, 180.
- holding containing 39 acres—lease made in consideration of £560 fine—covenant to keep corn-mill in repair. *Held*, that taking the character of the holding as a whole, it was agricultural. *M'Conaghy v. Gledstones*, 181.
- holding with corn- and flax-mills and 22 acres of land—corn-mill had ceased to be an element of profit. *Held*, to be agricultural. *Matson v. Woodhouse*, 186.
- holding with a steam scutching flax-mill, a corn-crushing mill, and a circular saw upon it, and 7 acres of land. *Held*, to have been let for the purposes of manufacture in connection with the linen trade, and not agricultural. *Nevin v. Montgomery*, 189.

MORTGAGEE :

- mortgage by owner in fee—lease by mortgagor after the mortgage, but before 1881, without consent of mortgagee—payment of rent by lessee to mortgagee—recognition of lease by mortgagee. *Roulston v. Caldwell and Cust*, 287.

NON-AGRICULTURAL :

- evidence of Lord Justice FitzGibbon, 9.
- holding one mile from Strabane, 12½ acres—rent, £45—tenant a flax merchant—six houses in the town of Strabane occupied by labourers not in the employment of the tenant. *Bradley v. Johnstone*, 192.
- tenant a solicitor—holding one mile from Portrush—3 acres, 39 perches—rent, £10—land taken to carry out a special purpose. *Crookshank v. Law*, 194.
- land taken by a tenant to improve the appearance and add to the amenity of his demesne and residence. *Allen v. Grogan*, 196.
- land held in connection with a convent devoted to Christian charity and education. *Carr v. Vernon*, 197.
- land taken for the purpose of ornamental planting and to secure privacy of tenant's demesne. *Lyle v. Greer*, 199.
- land planted, grazed, and treated as ornamental in connection with a mansion-house. *Pratt v. Gormanston*, 200.
- holding of 1 acre within the municipal boundary of Dublin—rent, £6 10s.—*Perry v. Farley*, 206.
- a labourer's cottage with 3 roods of land attached. *Looby v. Jones* 193.

OCCUPATION:

- bond fide*—evidence of Lord Justice FitzGibbon, 68.
- tenant in *bond fide* occupation of entire holding—sub-letting portion by landlord prior to creation of tenancy—assignment of the reversion—subsequent change of tenancy—proviso permitting sub-letting. *M'Master v. Jackson and Betty*, 213.

OCCUPATION—*continued.*

application by middleman to have fair rent fixed against his landlord before removal of caretaker in occupation under ejectment proceedings. *Garnett v. Garnett*, 172.

landlord making lease of lands, partly in his own possession, and partly in the hands of a tenant—lessee not deemed to be in occupation of the portion in the yearly tenant, and, therefore, not in *bond fide* occupation of the holding. *Cowell v. Buchanan*, 217.

where, through the result of an arrangement between the parties, a portion of a leasehold has been surrendered or re-demised to the landlord, the tenant can be treated as in *bond fide* possession of the holding within 44 & 45 Vict., c. 49, section 21, and entitled to have a fair rent fixed. *Nagle v. Galbraith*, 217.

where tenant's occupation interest has not been taken into account in fixing fair rent, Land Commission will not state a case for opinion of the Court of Appeal unless in a case where the question is distinctly raised by the evidence. *Young v. Guinness*, 220.

if a tenant is not in *bond fide* occupation when originating notice served, he cannot subsequently acquire an occupation to satisfy the requirements of the Act of 1881. *Kennedy v. Essex*, 367.

bond fide occupation. *See also Taylor v. Cooper*, 407.

OCCUPIER:

the lessee of an undivided share of land is not the occupier of "a holding" within the meaning of the Redemption of Rent (Ireland) Act, 1896. *Cummins v. St. Leger and others*, 308.

ORIGINATING NOTICE:

Chief Commission can amend by inserting the tenant's name. *Hempenstall's Estate*, 221.

notice served within the last twelve months of the first statutory term or premature—date from which term runs when rent is fixed by agreement and declaration. *Dunne v. Nettles*, 222.

(The decision of the Land Commission in this case was reversed by the Court of Appeal on the 1st March, 1897, after these Reports had been printed.)

expiry of lease after service and before hearing of originating notice. *Carney v. Arran*, 273.

PASTURE:

definition of, in Act of 1881, 11.

172 acres of land held by agreement in writing—more than 8 acres not to be broken up, and all hay made on holding to be consumed thereon. *Held*, that holding let mainly for pasture. *Harper v. Davies*, 226.

instrument of letting described the lands as a grazing farm. *Held*; that the case was outside the statutes. *Clynch v. Gore*, 229.

farm in county Meath—143 Irish acres—rent, £397 10s.—agreement of July, 1877, provided that tenant should not break or meadow any part without landlord's consent in writing—not within the statute. *Masterson v. Nicholson*, 229.

holding let to be used for pasture—purpose of letting—covenants—restriction in lease as to tillage—evidence as to course of husbandry—grass farm. *Held*, not to be a pasture holding. *Westropp v. Elligot*, 230.

PASTURE—continued.

contract of tenancy—letting wholly or mainly for purposes of pasture. *Flannery v. Nolan*, 239.

holding of 75 acres—restriction in lease as to tillage—2 acres only to be broken up—tenant not entitled to have a fair rent fixed. *Byrne v. Hill*, 240.

lease of two farms five miles apart—one holding—one of the farms, 130 acres, “shall be used and treated as a grass farm”—the other, 40 acres—liberty to break up entire of it, as shall be deemed advisable—“shall consume on lands all hay that shall grow thereon.” *Held*, that the purpose of the letting was for pasture. *Flanagan v. Crofton*, 250.

holding containing 140 acres—rent, £110—held under lease for thirty-one years or three lives—no prohibition as to tillage or meadowing. *Held*, that the letting was not exclusively for pasture purposes. *St. George v. Browne and another*, 252.

holding of 413 acres—rent, £526—held under lease—ancient pasture—land situate in a grazing district and not equipped for tillage—lease silent as to purpose of letting. *Held*, that letting was mainly for the purpose of pasture. *M'Cormick v. Loftus*, 254.

holding of 150 acres—rent, £194—3 acres under tillage—no building, save a herd's house. *Held*, to be a pasture holding. *Blake v. Blake*, 257.

120 acres, of which 45 acres might under the terms of the lease be annually under tillage or meadow. *Held*, that the land was a mixed and not a pasture farm, and that a fair rent could be fixed. *Burke v. Westropp*, 259.

holding leased for fifteen years to a butcher—lease provided that not more than 30 acres out of 163 should be broken up in any one year. *Held*, that the tenant was entitled to have a fair rent fixed. *Hanlon and Fay v. Bor*, 260.

tenant held 84 acres of a pasture holding, at a rent of £50. He also held a tillage farm adjoining, containing 18 acres, on which he resided. *Held*, that he was within sub-section 4 of section 58 of Act of 1881, and that a fair rent could be fixed. *Pelly v. Smith*, 261.

PENAL RENT

effect of fair rent order. *O'Connor v. Smith*, 263.

PERSONALTY:

effect of fair rent order on leasehold interest. *M'Evoy v. M'Evoy*, 168.

PRACTICE:

a party cannot give new evidence on appeal from the Land Commission, save on special grounds. *Stack v. Muskerry*, 264.

See also PROCEDURE.

PRE-EMPTION:

landlord's right of—effect of service of notice of intention to sell by tenant. *Farrelly v. Waller*, 265.

See also *Kelch v. Gormanston*, 266.

PRESENT TENANCY :

evidence of Lord Justice FitzGibbon, 39.

tenant of present ordinary tenancy from year to year—holding under deed made by immediate lessee whose lease expired before passing of the Act—assignee—sub-lessee. *Seymour v. Quirk*, 272.

leaseholder—expiring of lease after service and before hearing of originating notice—"application." *Carney v. Arran*, 273.

expiration of lease—new agreement with tenant continuing in occupation—making of lease deferred to defeat provisions of Land Law (Ireland) Act, 1887, sections 1, 3. *Wilgar v. Crommellin's trustees*, 274.

Land Law (Ireland) Act, 1887, section 1—the phrase "leases expiring within ninety-nine years" means leases which may expire, or are capable of expiring, not such as must expire, within ninety-nine years. *Bangor v. Fitzsimmons*, 274.

surrender of present tenancy—future tenant—resumption of possession by landlord—determination of tenancy—reverter. *Conroy v. Drogheda*, 277.

a lessee serving an originating notice under section 1, Act, 1887, does not acquire the *status* of a present tenant until the hearing of the application, so as to invalidate a sub-tenancy created in the interval between the serving of the notice and the hearing. *Johnson v. Egan*, 286.

tenancy subsisting at the passing of Act of 1881—mortgage by owner in fee—recognition of lease by mortgagee. *Roulston v. Caldwell and Cust*, 287.

See also Monahan v. Hinds, 444.

surrender of a tenancy existing in 1881—re-letting of a portion of same before January 1, 1883. *Held*, that the tenancy in portion so re-let was a present tenancy under section 57 of the Act of 1881. *Fitzsimmons v. Ellis*, 290.

B. sub-let his holding to W. in 1876. In 1885 B. was ejected by the landlord, who, no *habere* having been issued, obtained formal possession from W., whom he then re-instated in the holding, less by a portion at a reduced rent, which he afterwards paid. *Held*, to be a friendly proceeding not amounting to a surrender, and that the tenancy was a present one. *Watt v. Clanricarde*, 293.

tenant whose immediate landlord was evicted for non-payment of rent in 1889, and who thereupon attorned to the superior landlord. *Held*, to be a present tenant within the meaning of section 15 of the Act of 1881, by virtue of sections 12 and 50 of the Act of 1896. *Ferris v. Trustees of Thompson*, 295.

tenancy created in March, 1891, in succession in a tenancy previously existing—a present tenancy. *Conlan v. Campbell*, 297.

letting of, for grass, for one year certain, not a tenancy requiring notice to quit and not a present tenancy. *Wright v. Tracey*, 432.

the acquisition by a tenant of a present tenancy since the passing of the Act of 1881, of a small additional parcel of land, and the fixing of a bulk rent for the enlarged holding has not the effect of destroying the present tenancy. *Hagan v. Jackson*, 437.

PROCEDURE:

tenant served an originating notice to have a fair rent fixed on the first occasion on which the Court sat in 1881, and subsequently withdrew that notice, in order that the holding might be divided into two separate tenancies, for each of which agreements and declarations fixing fair rents were filed; the tenant of one of these tenancies was held to be entitled to have a fair judicial rent fixed for a second statutory term by virtue of section 4 of the Act of 1881. *Smart v. Jones*, 301.

Land Laws—Act, 1896, section 1 (1); section 50—Schedule—Applicability to cases pending appeal. The provisions of sub-section 1 of section 1 of the Land Law (Ireland) Act, 1896, are mandatory on the Chief Land Commission when hearing appeals. The schedule must be filled up in all cases. *Cunningham v. Cope*, 229. And the second report of *Cunningham v. Cope* is at the end.

REDEMPTION OF RENT ACT:

relation of landlord and tenant—evidence of Lord Justice FitzGibbon 18.

relation of landlord and tenant must exist. *Peacocke v. Christie*, 302.

payment of a fine—estimate of allowance on account of. *Poynton v. Smyth*, 305.

fine paid by tenant to landlord for conversion of lease for lives renewable for ever into a fee-farm grant. Amount of such considered in ascertaining the fair rent. Mode of computing same. *Bell v. Glenny*, 315.

a grant in perpetuity under Trinity College Leasing and Perpetuity Act, 1851, with a *toties quoties* covenant, is within the Act. *Gormill v. Lyne*, 306.

Held, that the owner of a grantee's interest under a grant made in 1837, was not entitled to the benefit of the Act, as the relation of landlord and tenant did not exist. *Adams v. Alexander*, 307.

the lessee of an undivided share of land is not the occupier of "a holding" within the meaning of the Act. *Cummins v. St. Leger* and others, 308.

lands were demised on 9th June, 1841, for a term of 150 years. In the year 1860 lessee agreed to give landlord a fine of £100 for a new lease for lives renewable for ever. Lease accordingly executed on 9th June, 1860. *Held*, that lessee was within the Act. *Sheridan v. Nesbitt*, 312.

a lease for lives renewable for ever executed after the Renewable Leasehold Conversion Act, and before the Landlord and Tenant Act, 1860, came into operation, is within the Act. *Langtry v. Sheridan*, 313.

right of redemption under section 16 of the Land Law (Ireland) Act, 1896—retrospective effect of. *Spaight v. Baker*, 314.

RESIDENTIAL:

(The words "residential holdings" do not occur in the Act of 1881.) evidence of Lord Justice FitzGibbon, 19.

a villa residence, with 8 acres of land attached, 6 acres of which was in lawn pasture, occupied by a solicitor. *Held*, not to be within the Act. *Carr v. Nunn*, 321.

RESIDENTIAL—continued.

holding of 17 acres with dwelling-house, formerly occupied by the Rector of Kenmare; not within section 71 of the Landlord and Tenant (Ireland) Act, 1870. *M'Cutcheon v. Lansdowne*, 323.

25 acres of land with a residence, occupied by a Dublin merchant at £300 rent as a residence. Not agricultural or pastoral. *Doyne v. Campbell*, 324.

a dwelling-house and 24 acres of land, consisting of a lawn, garden, and orchard; occupied by a solicitor near to the town of Ballymoney. Not within the Act. *Stott v. Cramsie*, 326.

lands described as "that part of the lands of Slane, called Castle Parks, with the dwelling-house, offices, and buildings of all kinds thereon, containing 86 acres, 3 roods, 30 perches, or thereabouts." Holding sold by auction. Landlord represented at sale, and did not repudiate representation by auctioneer that fair rent could be fixed. *Held*, that fair rent should be fixed. *Moonan v. Marquis of Conyngham*, 330.

a merchant in the town of Ballycastle holding 21 acres; rent, £22. *Held*, to be residential. *Sharpe v. Gordon*, 346.

RESUMPTION :

where a lessee serves an originating notice to fix a fair rent under the Land Law (Ireland) Act, 1887, section 1, the landlord cannot resume possession under that section until the end of fifteen years after the lessee has so become a present tenant. *Connolly v. Tyrell*, 348.

an agreement in writing between A and B, that on paying £20 B was to get possession of a farm of land, and also a lease for twenty-one years, at the yearly rent of £16 a-year; and that B, on giving up possession at the end of twenty-one years, having done no injury, was to get his money returned. *Held*, to constitute a valid agreement for an executory demise for twenty-one years, from the date of the payment of the £20. And that the landlord was entitled to resume possession of the holding. *Erskine v. Armstrong*, 353.

See Hamilton v. Sharpe, 137.

power in landlord to resume 5 acres undefined out of 65 acres for building purposes, will not disentitle tenant to have a fair rent fixed. *Mooney v. Willcocks*, 417.

REVERSIONARY LEASE :

reversionary leases, whether to the occupying tenant or to a stranger, are not within the operation of section 21 of the Land Act of 1881. *Sproule v. Ramsey*, 357.

SALE OF TENANCY :

See TENANCY.

STATUTES :

interpretation of. *Dowse, B.*, 433.

SUB-DIVISION :

bona fide occupation—evidence of Lord Justice FitzGibbon, 68.

sub-division not sub-letting—ejectment on expiration of lease. *Hurley v. Costelloe*, 364.

sub-division of holding—separate holding—right to have fair rent fixed. *Boyd v. Tredennick*, 366.

SUB-LETTING:

created in the interval between the service of originating notice and the hearing does not disentitle tenant to have a fair rent fixed. *Johnson v. Egan*, 286.

bond fide occupation—trivial sub-letting—consent on part of landlord—non-enforcement of covenant against sub-letting. *Kennedy v. Essex*, 367.

the interest in a lease comprising 54 acres, made in 1828, was assigned to the tenant in the year 1878 by a deed, describing the premises as "now in the possession of W. (the assignor) and his under-tenants." At this date portions were sub-let to A, B, C, D, E, and F. The landlord's agent endorsed on the deed his assent to this assignment. *Held*, that this was sufficient evidence of a consent by the landlord to the sub-lettings in existence at the date of the assignment. *Robinson v. Wakefield*, 368.

the sub-letting of a slated dwelling-house upon a holding to a person not in the employment of the tenant, disentitled the tenant to have a fair rent fixed. *Steele v. M'Naghten*, 394.

a holding containing 30 acres, with a plot of land in the village of Dercock, with a house sub-let to two tenants. *Held*, not to be in the occupation of the tenant. *Neill v. Macartney*, 396.

consent by agent to assignment reciting possession of under-tenants—receipts for rent and payments for privilege of sub-letting. *Robinson v. Wakefield*, 397.

tenant held 50 acres about a mile from Baltinglass, and a small plot in the town, on which there was a house sub-let at £8 a-year; the sub-letting was made in 1894 after the passing of the Act of 1887. *Held*, that the tenant could not avail himself of the saving clause in the 8th section of that Act. *Brien v. Tollemache*, 398.

D., who held an agricultural holding under W. as tenant from year to year, sub-let the holding to H. as a yearly tenant. While H. was in occupation and a present tenant within the meaning of the Land Law (Ireland) Act, 1881, W. served a notice to quit, and determined D.'s tenancy. *Held*, that H. thereupon became tenant from year to year to W., and entitled to fix the fair rent of the holding. *West v. Huggard*, 399.

sub-dividing without consent—statutory prohibition—act of sub-division void, not voidable—interpretation of condition of a bond—prohibition not amounting to misdemeanour. *Fogarty v. Shanahan*, 406.

where sub-tenants were in occupation of a considerable part of the holding previous to the letting to the predecessor of the present tenant, and had rents fixed on the passing of the Act of 1881, and never surrendered. *Held*, that the tenant was not in occupation of the holding. *Taylor v. Cooper*, 407.

SUB-LETTING (TRIVIAL):

A., in 1863, demised certain lands to M., for three lives. At the time of the demise A.'s agent insisted that G., who was in occupation of 4 acres, 3 roods, and 30 perches, Irish, of the said lands, and paying rent therefor to M., should be "taken on" as sub-tenant to M., at £4 10s. rent. G. died in 1870. No administration was taken out to G. G.'s only son had a fair rent fixed. *Held*, that what took place in 1863, when the lease was made, was a consent to the sub-tenancy of G., and that the sub-letting was trivial. *Mulcaire v. Lane-Joynt*, 382.

SUB-LETTING (TRIVIAL)—*continued*.

a holding of 162 acres on which there were three sub-tenants holding respectively $2\frac{1}{2}$ acres, 2 acres, and $\frac{1}{4}$ acre. Sub-lettings held to be trivial. *White v. White*, 385.

out of a holding of 161 acres, 4 acres and 29 perches were sub-let. *Held*, to be trivial. *Ward v. Corballis*, 389.

SUB-TENANCY:

See Garnett v. Garnett, 172.

SURRENDER:

Conroy v. Drogheda, 277.

where a tenancy in a holding of 14 acres (held under a lease for the life of the lessee) was surrendered in 1882 by his widow, some years after the death of the lessee, and the landlord divided the holding into three separate parts, and re-let them in November, 1882. *Held*, that the tenancy in the portion so re-let was a present tenancy under section 57 of the Act of 1881. *Fitzsimmons v. Ellis*, 290.

a tenant, B., sub-let his holding to W. in 1876. In 1885 B. was ejected by the landlord, who—no *habere* having been issued—obtained formal possession from W., whom he then re-instated in the holding, less by a portion at a reduced rent, which he since paid. *Held*, not to amount to a surrender. *Watt v. Clanricarde*, 293.

TEMPORARY CONVENIENCE:

evidence of Lord Justice FitzGibbon, 30.

onus probandi, etc. *Crookshank v. Law*, 194.

a field containing 5 acres, 1 rood, and 4 perches called the "Windmill Field," situate in the Electoral Division of Rathmines, in the South Dublin Union, lately held under lease at a rent of £30. *Held*, to have been let for temporary convenience. *Eiffe v. McKennas*, 408.

on the expiration of a twenty-one years' lease in May, 1879, the owner of the reversion was an infant, and had been for about twelve years a ward of Court. Receiver in the minor matter continued to accept from C., the lessee, the same rent after the termination of the lease. *Held*, not to be a tenant of a present tenancy. *Croker v. Clanchy*, 415.

a letting made with power to landlord to resume portion of the holding for building purposes. A letting for temporary convenience. *Whisker v. Delacherois*, 416.

out of a holding of 65 acres, the landlord was entitled to resume possession of 5 acres for building. *Held*, that the 5 acres not being defined, the letting could not be regarded as being made for the temporary convenience of the parties. *Mooney v. Willcocks*, 417.

tenant held under an agreement for a lease, dated 31st August, 1848, for forty-one years. After the expiration of the lease the landlord received rent from the tenant under an ordinary contract of tenancy. *Held*, not to be a letting for temporary convenience. *Baily v. Dobbs*, 424.

32 acres in the vicinity of Derry, held at a rent of £40, under a lease for five years, which expired in November, 1870. Landlord in 1883 permitted a sale of the tenant's interest in the holding, and for four years thereafter accepted rent from the purchaser. *Held*, not to have been let for temporary convenience. *M'Auley v. Brown*, 426.

TEMPORARY CONVENIENCE—continued.

by an agreement made in 1871, the landlord reserved to himself the right to take up possession of the holding for building sites. *Held*, that at the time the Act of 1881 came into operation, the holding was let for the temporary convenience of the landlord. *Thompson v. Cleland*, 428.

a letting of land in exchange for other land intended to be used for the planting of trees so as to beautify the approach to a demesne is not a letting for temporary convenience. *Hood v. Abercorn*, 429.

a holding of 45 acres, held at a rent of £47 10s., purchased by the tenant from the Rev. Mr. Strong, Presbyterian minister of Killesandra. Tenant had promised to give up possession whenever the congregation required the land. *Held*, by Land Commission and subsequently confirmed by Supreme Court of Judicature, that letting was for temporary convenience. *M'Ginley v. The Education Board of the Cavan Presbytery*, 430.

TENANCY, FUTURE :

evidence of Lord Justice FitzGibbon, 39.

tenancy, created by an agreement dated 1st July, 1893—holding part of a larger holding held by another tenant prior to that date. *Held*, to be a future tenancy. *Kelly v. Campbell*, 133.

See also Kelly v. Hamilton, 440.

and Monaghan v. Hinds, 444.

TENANCY, PRESENT :

See PRESENT TENANCY.

TENANT FOR LIFE :

lease by, for his own life. *Massy v. Norse*, 442.

agreement by, fixing a fair rent—inadequate rent fixed to the prejudice of remainder-man and incumbrancer—fraud. *Evans v. Peyton*, 443.

acceptance of rent by remainder-man. *Fitzsimmons v. Ellis*, 445.

lease executed by—fine paid. *Looby v. Finch*, 163.

TENANT'S IMPROVEMENTS :

See IMPROVEMENTS.

TENANCY, SALE OF :

notice of intention to sell—effect of. *Farrelly v. Waller*, 265.

a landlord of an estate which is the subject of proceedings for sale in the Land Judges' Court can exercise his right of pre-emption without the permission or control of the Court. *Kelch v. Gormanston*, 266.

application by landlord to declare a sale void, pending at the commencement of the Land Law (Ireland) Act, 1896—alienation otherwise than for consideration in money or money's worth. *Held*, that the Court had no power to set aside such an alienation. *Fox v. Gloster*, 358.

See also McFarlane v. Trustees of Cinnamond, 438.

and Reddy v. Elliott, 439.

TENANCY (SUB-TENANCY) :

See Garnett v. Garnett, 172.

TENANT:

re-instatement of, waiving statutory forfeiture. *Thompson v. Templeton*, 441.

social status of. *Anderson v. Ffolliott*, 76.

also *Moonan v. Cunningham*, 344.

TENANT-RIGHT:

nature and definition of. *Jolly v. Archdall*, 464.

TILLAGE HOLDING:

leasehold land capable of being used for tillage. *St. George v. Browne and St. George*, 252.

TOLLS:

the tenant of a holding consisting partly of lands and partly of tolls of a fair, cannot have rent fixed up on the holding unless the tolls form so insignificant a portion of the holding as to be non-existent. *Wall v. Eyre*, 466.

TOWN-PARK:

evidence of Lord Justice FitzGibbon, 33.

TOWN-PARKS:

a field in a village in the County of Donegal, in the occupation of a person living in the village, held not to be a town-park. *Leitrim v. Gallagher*, 468.

a holding of 3 acres, with three houses on it, in one of which, abutting on the street of Bundoran, claimant lived, and the land stretching behind the house. *Held*, not to be a town-park. *Daly v. Scott*, 469.

the claimant held 6 acres within three-quarters of a mile of Castle-derg. He resided in the town until after the service of the notice to quit; he grazed and laboured the land in rotation. *Held*, not to be a town-park. *Chism v. Beatty*, 470.

recent letting—value, etc. *Gilmore v. M'Kelvey*, 472.

a holding situated near Timoleague, immediately at the rear of the houses in that town or village. *Held*, to be a town-park. *M'Carthy v. Travers*, 473.

tenant held two pieces of land near Bray, one at a rent of £30, and the other at a rent of £40. *Held*, that the holdings taken as one holding was a town-park. *M'Donald v. Orme*, 475.

three small plots of land near a town, held under three different landlords, the tenant being a shopkeeper residing in the town. *Held*, not to be town-parks. *Mintern v. Babington and others*, 476.

tenant, a merchant in Bushmills, took 30 acres of land about 300 yards from the town at a rent of £52; he grazed cows upon it, and sold the milk and butter in his shop. *Held*, not to be a town-park. *Taggart v. Macnaghten*, 477.

if the holding be within the definition of "town-parks" contained in section 58 of the Land Law (Ireland) Act, 1881, the onus of proving that it comes within the exception created by section 9 of the Land Law (Ireland) Act, 1887, rests upon the tenant. *Daly v. Wright*, 478.

a holding situate in Ballynahinch, which was originally 13 Irish acres: 8 of these acres were let to the tenant in 1864, at three guineas per acre. The tenant was a publican in the town and a cattle dealer. *Held*, to be a town-park. *M'Lean v. Mulholland*, 481.

TOWN-PARKS—*continued*.

whether a place is a town so as to constitute one of the statutory requisites for making a holding in its neighbourhood a "town-park," depends on whether it can be fairly described in ordinary language as a "town," and whether there are living in the place people who want land for their own accommodation, and are willing to pay for it more than its ordinary value. *Archer v. Caledon*, 483.

two holdings situated close to the town of Lifford; one containing 2 acres, 2 roods; rent, £3; the other, 6 acres, 1 rood, 16 perches; rent, £41 1s.; lands conveyed by tenant held to be town-parks. *Gillespie v. The Earl of Erne*, 489.

the onus of proof of enhanced value lies upon the landlord; accommodation lands must be of the character of town-parks to be excluded from the Acts, not lands that were generally used for accommodation purposes. Proximity value defined. *Perry v. Goodbody*, 490.

accommodation land—onus of proof—evidence of increased value. *M'Cann v. Downshire*, 494.

lands in the vicinity of Carlow, held under fee-farm grants. *Held*, to be town-parks. *Mahony v. Hibernian Marine Society*, 504.

TRUE VALUE:

meaning of. *Ager v. Sealy*, 505.

the true value of a tenancy within the meaning of section 1, subsection 3, of the Land Law (Ireland) Act, 1881 (44 & 45 Vict., c. 49), is not restricted to the value of the improvements on the holding made by the tenant or his predecessors in title, for which he has not been paid or compensated by the landlord. *Curneen v. Tottenham*, 510.

See also *Gawley v. Dartrey*, 515.

and *Johnston v. Courtenay*, 519.

ULSTER CUSTOM:

a landlord is bound to pay under the custom what a solvent tenant would give. Deterioration is not a subject of set-off under the custom, but may properly be regarded in estimating the *bona fides* of the tenant-right. *Johnstons v. Patton*, 520.

a tenant of lands then subject to the Ulster tenant-right custom having been served with a notice to quit in 1867, entered into a written agreement with his landlord to take the lands as tenant from year to year, determinable by six months' notice to quit, with a clause that he should not assign, sub-let, let in con-acre or for a crop, or sub-divide for grazing, or part with the possession of the land, or any part thereof, and that on breach he should pay an additional rent, recoverable as the rent reserved; and with clauses that he should not be entitled to any compensation for any building or improvement unless previously stipulated for by an agreement in writing, signed by both parties, and that the tenancy should cease on the bankruptcy or insolvency of the tenant. The landlord determined the tenancy by a notice to quit.

Held, that the tenant was entitled to the benefit of the Ulster tenant-right custom. *Stevenson v. Leitrim*, 521.

ULSTER CUSTOM—*continued.*

tenant-right will not attach to a farm held under a lease made in 1851, it being admitted that the custom only began to be practised on the estate in 1850. Whether the custom extends to leasehold tenancies is a matter of fact. A landlord cannot by recent alterations destroy a usage of ancient date, if that usage can be shown to attach to the holding. *M'Cullough v. Waring*, 522.

sub-division will not disentitle a claimant to the benefits of the custom, where the usage is to require the person who came in by the sub-division to sell to the other occupier, and it is not proved that the landlord made such a requirement, *Friel v. Leitrim*, 523.

lands anciently subject to the Ulster tenant-right custom—part of an estate on which the custom was observed from 1851 to 1860—were in the famine years surrendered by the tenants, who left while owing arrears of rent, and were assisted by the landlord to emigrate. They were subsequently, in 1859, relet by the landlord, who had occupied them in the interval, to a tenant who undertook to erect a dwelling-house on the lands. *Held*, that the reletting was subject to the Ulster tenant-right custom. *Magee v. Marquis of Bath*, 527.

a tenant who parts with his interest in his farm without the landlord's consent—the custom of the estate being that the landlord should have a voice in the selection of the incoming tenant, and that an adjoining tenant should have the preference—disentitles himself to the benefit of the custom. Landlord and Tenant (Ireland) Act, 1870. *Donnelly v. Shield*, 529.

on an estate where the custom is that the sale should be with the consent of the landlord or his agent, who fixes the price, and selects the incoming tenant, a tenant sold to an adjoining tenant, notwithstanding notice by the agent that the sale would not be permitted. *Held*, that neither the outgoing nor the incoming tenant could sustain a claim under the Ulster custom. *Lappin v. Coote*, 530.

a landlord capriciously refusing to accept a purchaser of a tenant-right interest, is bound to pay compensation—Landlord and Tenant (Ireland) Act, 1870. *O'Brien v. Scott*, 531.

Landlord and Tenant (Ireland) Act, 1870—Purchase of the Ulster tenant-right custom—Letting wholly or mainly for the purpose of pasture. *Byrne v. The Earl of Arran*, 532.

a small estate, surrounded by estates on which the custom prevails, must be presumed to be subject to the same custom, in the absence of proof to the contrary. *Turner v. Nolan*, 534.

sale of a tenancy on an estate subject to the Ulster custom—Preference to adjoining tenant—Land Law (Ireland) Act, 1881, s. 1, s.-s. (12). *Boyle v. Conyngham*, 535.

Ulster tenant-right—increased letting value of holding arising from development of the district, etc. *Porter v. Abercorn*, 535.

Ulster custom—presumption as to improvements—agricultural buildings—Equipments of holding. *M'Glynn v. Abercorn*, 539.

buildings erected by the tenant or his predecessors in title on a holding subject to the Ulster tenant-right custom are not liable to rent, even when they are not "suitable to such holding, being part of the interest of the tenant in such holding." *Carson v. Molyneux*, 557.

ULSTER CUSTOM—continued.

notice of tenant to sell—Ulster custom—application by landlord to declare sale of the tenancy under the Ulster custom void—*Held*, that tenant bound by service of his notice to sell. *Wilcox v. Slacke*, 562.

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land that had once been demesne may be undemesned. *Hewson v. Listowel*, 566.

nineteen acres, portion of a larger holding which had originally been demesne, held and used for agricultural purposes, held to have been undemesned. *Cheevers v. Fallon*, 567.

lands described in a lease of 1787 as demesne lands since used as an ordinary agricultural holding, having lost all traces of demesne—*Held* not to be demesne. *Stitt v. Hamilton*, 569.

the onus of proving that the holding consists of "land which when first demised was demesne, and which the provisions of the contract of tenancy or the circumstances of the holding show was intended to be preserved as demesne, or resumed as demesne by the landlord," lies on the landlord. *Cleary v. Daly*, 570.

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APPENDIX:
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SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
February,
1897.

(Before FITZGIBBON, BARRY, and WALKER, L.JJ.)

Meath v. Magan.

Landlord and Tenant (Ireland) Act, 1860, s. 10—Land Law (Ireland) Act, 1881, s. 1—Land Law (Ireland) Act, 1896, s. 19.

Lease containing covenant against alienation was assigned by a tenant who was not in occupation of the holding at the time of the assignment.

Held, that the assignment made by the Countess of Meath was void, inasmuch as she was not a tenant within the meaning of the Irish Land Acts, and that Lord Meath, the tenant and applicant, was not entitled to have a fair rent fixed.

By lease dated 1865 the lessors demised to William Earl of Meath 91 acres of the lands of Irishtown for a term of eighteen years from the 25th March, 1862. The lease contained a covenant against alienation. By an agreement of same date, by way of endorsement on the lease, it was agreed that William Earl of Meath should hold 10 additional acres of the said lands of Irishtown for the same term, and subject to the same covenants contained in the said lease.

The lease expired on the 25th of March, 1880, and the lessee remained in possession of both lots, paying the rents reserved by the lease and the agreement. The lessee, William Earl of Meath, died on the 26th of

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May, 1887, when his successor, the present Earl, went into possession of both holdings, believing that the estate and interest of the lessee had passed to him under certain deeds by which the family estates had been settled. In 1894 the tenant, Reginald Earl of Meath, preferred two fair rent applications before Kane, C.C.J., Wicklow ; and on the 25th January, 1895, his Honor dismissed both applications on the ground that the lands were demesne lands. From the order so made Lord Meath appealed, and the Land Commission held that the lands were not demesne lands ; but being of opinion upon the evidence that the tenancies in the holdings had never become vested in Lord Meath, but had passed to Harriet Dowager Countess of Meath under a codicil to the will of the late Earl, they, on the 17th May, 1895, dismissed both originating notices. By an indenture of the 26th October, 1895, the said Countess of Meath assigned her interest in the said tenancies to Reginald Earl of Meath, in whose occupation they had been since the death of his predecessor, William Earl of Meath.

The consideration for the assignment was a nominal one. In the month of January, 1896, Lord Meath again served two originating notices in the Civil Bill Court to have fair rents fixed, when the County Court Judge fixed fair rents upon both the holdings. From those decisions the landlord appealed, when Mr. Justice Bewley and Mr. Commissioner Fitzgerald reversed the decision of the County Court Judge, and dismissed both applications. From that decision the tenant, Lord Meath, appealed.

FitzGibbon,
L.J.

FITZGIBBON, L.J.—Lord Meath's title is admittedly a derivative tenancy, and unless he could show that the tenancy which William Lord Meath had in the lands is now vested in him, he fails. The first Lord Meath's tenancy was as to a portion a tenancy for eighteen years. It has been argued by Mr. Matheson that the clause against alienation (apart from statute) was not carried forward

by the rule of law which makes a continuing tenancy from year to year subject to all the terms of the contract of tenancy which had expired, so far as they are applicable. It is important here to bear in mind that this is a case of presumption as to the terms of the agreement, because we have the notice served by Lord Meath on the landlord when he gave notice of the transaction that had taken place between him and the Countess; and there it is stated, not only that what was assigned to him was the original tenancy, with all the covenants and conditions in the original agreement, but, furthermore, that he had covenanted to indemnify the Countess against any breach of them; and hence it is clear, apart from the statute, that the continuing tenancy was subject to the conditions against alienation. As regards the effect of such an agreement, it is quite settled, and it is too late to disturb the law as settled, that whether the form is covenant or condition, penalty or additional rent, it is equally an indication that in the mind of the parties alienation was restrained, if not prevented. Therefore, irrespective of statute, the derivative title which Lord Meath throws down is through a deed which is void. Sec. 1 of the Act of 1881 says "the tenant for the time being" may sell his tenancy. The only tenants and the only holdings to which the Act can apply are the tenants for the purposes of the Act and the holdings within the Act. That being so, what was the position of the Countess of Meath when she assigned to Lord Meath? Was she tenant of this holding? Was she, in fact, in occupation? Certainly, personally, she was not in occupation. It is contended that Lord Meath was in as agent or trustee, or as servant or bailiff to his mother. Reading the recitals in the deed executed by Lady Meath on 26th October, 1895, I have come to the conclusion that there was never any occupation in fact by the Countess at all till the mistake was discovered that Lord Meath believed the lands to be his own. The

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assignment was by a person not within s. 1 of the Act of 1881 to a person who had not got the necessary consent. Sec. 19 of the Act of 1896 strengthens the views we take on the main contention, because if the words "tenants for the time being" are to be confined to cases to which the Act applies, we have only to do the same when we come to section 19 of the recent Act. Unless a tenant is entitled to have a fair rent fixed, he is not entitled to have a sale under sec. 1 of the Act of 1881. I am of opinion that Lord Meath had no title to a tenancy in these lands, and never became a person entitled to serve an originating notice. The appeal must be dismissed.

Barry and Walker, L.JJ., concurred.

Land Com.
January,
1898.

LAND COMMISSION.

(Before MEREDITH, J.)

Kinsella v. Frankfort.

Buildings erected prior to Tenancy and since—Arterial drainage paid for by tenant—Deductions from the rent in respect of, disallowed.

MEREDITH, J.—In this case there was a question as to the ownership of buildings. The tenant must be exempted from rent in respect of the portion of the building erected since his proposal of 1873; but having regard to the break in the tenancy at that date, and the admission by the tenant in that accepted proposal, he was not entitled to be exempted from rent in respect of

buildings erected prior to that date. The former rent was £178 10s. ; judicial rent, £139 ; they now fixed the rent at £145. In another case between the same parties the Court was of opinion that the landlord was entitled to have the rent assessed upon the holding as it stood without any deduction being made in respect of the additional rent which the tenant had been paying for arterial drainage effected by the landlord. The former rent was £145 ; judicial rent, £124 ; raised to £132 10s.

Land Com.
January,
1898.

Kinsella
v.
Frankfort.

SUB-COMMISSION.

Sub-Com.
May 12,
1897.

(Before DOYLE, A.L.C.)

Freeman v. Wolsely and Fitzgerald.

Demesne—Sub-letting—Land Law (Ireland) Act, 1896.

This was an application by the tenant to fix a fair rent for a holding described on the Ordnance map as the demesne lands of Culverstown, about three miles from Kilcullen, and about 126 Irish acres in extent. The landlords hold under a fee-farm grant from Major Burrows. At the time the letting was made to the tenant in the present proceeding it included four sub-tenancies, the tenants of which had got fair rents fixed against the lessee, Freeman. In 1890 Sub-Commissioner Kane fixed £300 as a fair rent for the entire holding, overruling an allegation that it was demesne land ; but, on an appeal by the landlord, that decision was set aside on the ground that the tenant was not in possession of the entire of the lands, owing to the existence of the sub-tenancies. Under the Act of 1896, the tenant having become entitled to have a fair rent fixed, notwithstanding the sub-tenancies, it was now contended

Sub-Com.
May 12,
1897.

on the part of the landlords that the land was demesne land.

DOYLE, A.L.C., said it was clear that the lands had never been demesne lands during the time that they were in the possession of the present landlords, although in the last century the place evidently was a demesne. A fair rent would be fixed.

Land Com.
January,
1898.

LAND COMMISSION.

(Before MEREDITH, J., and HON. G. FITZGERALD, Q.C.,
Commissioner.)

Norton v. M'Donnell.

Previous Application under Land Law (Ireland) Act, 1881, dismissed—Application to sever the Demesne and Mansion, and to fix a Fair Rent on the agricultural portion of the holding—Land Law (Ireland) Act, 1896, s. 5.

This was an appeal by both the landlord and the tenant against a fair rent fixed by the Sub-Commission Court on the lands and premises of Turvey, near Donabate, in the County of Dublin. The holding is a very large one ; and it was held by Mr. Norton, who was a corn merchant and maltster in the City of Dublin, from Miss M'Donnell, at a rent of £1,031 11s. 3d. ; who, in her turn, held herself under lease from Lord Trimbleston. The case was before the Sub-Commission Court in 1888, and went to the Court of Appeal, when the originating notice was dismissed on the ground that portion of the holding consisted of the mansion-house and demesne of Lord Trimbleston at Turvey, Donabate. A second originating notice, served after the passing of

the Land Act of 1896, provided that the portion which was not demesne might have a fair rent fixed upon it if the severance of the holding did not affect injuriously the interests of the landlord. The middle landlord, Miss M'Donnell, appealed against the decision on the ground that the severance of the holding would injuriously affect her interest, and also that it was a pasture holding. The trustees of the head landlord got liberty to intervene, and they appealed on the further ground that the whole holding was demesne. The Sub-Commission decided that a fair rent should be fixed on the larger part of the holding, and they apportioned the rent on the mansion-house and the demesne land under the provisions of the recent statute. The old rent being £1,031 11s. 3d., they fixed a fair rent on the agricultural land of £605, and they apportioned the rent on the mansion-house and demesne at £180.

Land Com.
January,
1898.

Norton
v.
M'Donnell.

LAND COMMISSION.

Land Com.
June,
1897.

(Before BEWLEY, J., and HON. G. FITZGERALD, Q.C.,
Commissioner.)

Cooper v. Cooper.

Lease under 1 Wm. IV., c. 65, s. 24—Demesne Land, &c.
—Temporary Convenience.

This was an appeal by the tenant from an order of a Sub-Commission dismissing the tenant's application on the ground that the land in respect of which the application was made was demesne land. The holding, which is situated near Gormanstown, County Meath, contains 410a. 3r. 2p., is known as Cooper's Hill, and there are a dwelling-house and offices on it. The rent was £518 a-year.

Land Com.
June,
1897.

Cooper
v.
Cooper.

The sole ground on which the landlord's contention rested was the use of the word "demesne" in a lease of 1875, under which the tenant went into possession. This holding had none of the characteristics of a demesne. It had a large residence ; but it was a large farm, and was suitable only for a farm. The lease was framed by Master FitzGibbon in a lunacy matter in 1875, after a very careful investigation into the state of the holding, with the result that there was absolutely nothing in the lease pointing to an exclusion from the Act of 1870, or any covenant pointing to a resumption of the holding as demesne land. The lessee died in 1895, and there was a suit at present pending for the administration of his estate.

Counsel for the landlord said, as far as living memory went, these lands had always been in the occupation of the Cooper family. When the owner became a lunatic, the land was leased to his brother, evidently with the intention of keeping the place in the family ; and in all the documents the place was called demesne. Counsel also contended that this was not a letting that came within the Land Act. The lease was made by the committee of the lunatic to himself ; it was more in the nature of an occupation lease, under the Court, to an owner in possession, which was decided in *Lawrence's Estate* to be entirely outside the Land Acts. There was no landlord or tenant ; the committee was both one and the other, and was accounting to himself, that so far as he took any benefit under the lease he must take it as a trustee for the tenant. Counsel also contended that the letting was for temporary convenience.

The Court affirmed the decision of the Sub-Commission, and dismissed the tenant's appeal with costs.

LAND COMMISSION.

Land Com.
December 21,
1897.

(Before BEWLEY, J., HON. G. FITZGERALD, Q.C.,
and O'BRIEN, Commissioners.)

Aughnay v. Vesey.

Demesne—Land Law (Ireland) Act, 1896, section 5.

BEWLEY, J.—In this case a question has been raised on behalf of the landlord, and it is contended that the holding is demesne within the meaning of the Land Law Acts. A former application to fix a fair rent, at a time when Mr. Philip Newton, Mrs. Vesey's predecessor in title, was landlord, was dismissed by the Court of Appeal on the ground that the holding was let to be used mainly for the purpose of pasture. As the valuation of the holding does not exceed £100 a-year, and the tenant resides on the lands, and, moreover, the lands appear to be used as a dairy farm, this objection on the ground of a pasture holding can no longer prevail, and accordingly the sole question we have had to consider is whether those lands are demesne lands. They are held under a memorandum of agreement, dated 17th November, 1865, made by Mr. Philip Jocelyn Newton to the present tenant, John Aughnay, for a term of twenty-one years or the life of the lessee. Although that is merely an agreement, it is a lease within the meaning of the Landlord and Tenant Act of 1860, and the agreement in itself contemplates that a lease and counterpart should be executed at any time at the request of the tenant. On a careful review of the evidence, my colleagues and I are of opinion that neither at the date of the letting here, nor at any subsequent date, were the lands in the originating notice now

Land Com.
December 21,
1897.

Aughnau
v.
Vesey.

Bewley, J.

before the Court demesne lands. On this ground, therefore, the landlord's contention fails. But I may go on further to say, as this case may go to the Court of Appeal, that even if the lands had been demesne lands at the time the letting was made, they do not appear to me to be excluded by the 5th section of the Land Act of 1896. To exclude lands as demesne under that section, it must be shown not merely that they were demesne when first demised, but that, according to the provisions, the contract of tenancy or the circumstances of the case show that it was intended to preserve them as demesne, so that they should be resumed as demesne by the landlord. I think that there are no such terms in the contract of letting, or no such special circumstances here. For these reasons we think that there is no legal difficulty in fixing a fair rent in this case. The old rent was £137, the fair rent fixed by the Sub-Commission was £80, and the majority of the Court are of opinion it should now be fixed at £88.

Leave was given to the landlord to appeal.

Land Com.
May,
1897.

LAND COMMISSION.

(Before BEWLEY, J., FITZGERALD, Q.C., and O'BRIEN, Commissioners.)

Colthurst's Estate.

Drainage and Reclamation effected by Loan from Board of Works by Landlord—Power of Board of Works to determine increase of Rent in respect of 43 & 44 Vict., section 10—The Relief of Distress (Ireland) Amendment Act, 1880.

BEWLEY, J.—In cases heard in Cork on the estate of Sir George Colthurst, the solicitor for the tenants urged that in dealing with the question of improvements they

should take into consideration the 10th section of the 43 & 44 Vict., the Relief of Distress (Ireland) Amendment Act, 1880. Under that Act, in the present case, the landlord obtained a loan, and that loan was expended in improvements either in the way of reclamation, drainage, or buildings upon the holdings of the tenants. Having quoted the section of the Act dealing with the matter, his Lordship said that, under the existing law in cases relating to drainage or other improvement of land in Ireland, the landlord who borrowed money from the Board of Works, and expended that money on improvements on his tenants' holdings, was entitled to an increase of rent to compensate him for the amount of money so expended, and in the case of the landlord and tenant disagreeing as to what the increase of rent ought to be, power was given to the Board of Works by award or order to determine what the increase of rent should be. In none of these cases was any demand made for an increase of rent, and in none of the cases was there an award made by the Board of Works. Accordingly, they had come to the conclusion that the section had no application. In the first case the old rent had been £61, and in 1883, in face of expenditure on improvements, so far from being increased, it was reduced to £48. That rent was now still further reduced to £37 10s., and they now confirmed that judicial rent.

Mr. Commissioner O'Brien dissented.

Land Com.
May,
1897.

*Colthurst's
Estate.*

Bewley, J.

Land Com.
Feb., March,
1897.

LAND COMMISSION.

(Before BEWLEY, J., and MR. COMMISSIONER
FITZGERALD, Q.C.)

Hines v. Bell.

Future tenancy—Land Law (Ireland) Act, 1896, sec. 50 (2).

Sub-tenants, holding under a middleman, whose interest had been evicted, signed covenants becoming tenants to the superior landlord.

Held, that they were future tenants, reinstated in their holdings, but not reinstated in their tenancies. It appears that the lands of the sub-tenants will, under such circumstances, be deemed to be in the legal possession of the landlord, and section 50 of the Land Law (Ireland) Act, 1896, does not apply to such tenants.

Appeal.
May 3,
1897.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before FITZGIBBON, BARRY, and WALKER, L.JJ.)

Muldoon v. Crean.

Land Law (Ireland) Act, 1881, section 57.

The tenant had been in occupation of the lands for grazing for eleven months prior to 1st November, 1881, and from that date as tenant from year to year.

The Sub-Commission, DOYLE, A.L.C., fixed a fair rent upon the holding. The Land Commission reversed the Sub-Commission's order, and the Court of Appeal unanimously held that the tenant was not a present tenant of a tenancy which was subsisting at the passing of the Land Law (Ireland) Act, 1881. They therefore dismissed the tenant's appeal with costs.

SUB-COMMISSION.

Sub-Com.
May 20,
1897.

(Before BAILEY, A.L.C.)

Courtenay v. Trustees Anderson.

Land Law (Ireland) Act, 1881—Surrender of lease—Acceptance of new lease in 1886—Continuing covenant that lessee would not acquire any rights under the Irish Land Acts, and that portions of the holding could be resumed for building; held to be a future tenancy.

BAILEY, A.L.C.—In this case is there evidence outside that deduced from the creation of an inconsistent tenancy in the lands that the tenant intended to surrender his tenancy, which was in existence between 1881 and 1886? When the lease of 1886 was made, the tenant was holding either under the lease of 1881 or a yearly tenancy that grew up on its expiration—he was, in fact, a present tenant under the Land Acts. The mere taking of the other lease would not, in my view, be sufficient to show that the tenant intended to surrender his present tenancy. We have practically no evidence outside that contained in the lease to guide us as to the intention of the parties. But the covenant in the new lease of 1886, providing that the landlord may resume possession for building purposes, together with the further covenant that the tenant “shall not by reason of this demise acquire any rights whatever under the Land Act of 1881, or any other Act at present existing, or hereafter to be passed, regulating the tenure of land in Ireland,” shows that the tenant knew, when entering into the new demise, that he was putting himself outside of the Land Acts. He took a lease which was, if he intended to destroy his old tenancy, equivalent to the creation of a new tenancy.

- Sub-Com. May 20, 1897. He entered into covenants which clearly show that, in entering into the new tenancy, he was abrogating any rights he might have possessed under the old tenancy.
- Courtenay v. Trustees Anderson.* His covenants, in fact, show that he intended to surrender his former tenancy, and take a new and future tenancy. The covenant for resumption for building purposes would not, of course, exclude the tenant from having a fair rent fixed (Act, 1896, section 8), but it shows clearly an intention to surrender. The tenant in 1886 doubtless thought that he was outside the Land Acts—that he held under a lease for temporary convenience. This probably made him more careless than he otherwise would have been in entering into a new tenancy, but it estops him from denying that he intended to surrender his previous tenancy. We are of opinion that the tenant holds under a future tenancy.
- Bailey, A.L.C.

Land Com.
January,
1898.

LAND COMMISSION.

(Before MEREDITH, J.)

Burke v. Bond.

*Land Law (Ireland) Act, 1881, section 20, sub-section 2—
Eviction of tenant—Subsequent reinstatement—
Future tenancy.*

MEREDITH, J.—In this case the former rent was £72 6s. 6d. The Sub-Commission fixed a judicial rent at £48 16s., and the landlord appealed upon the ground that the tenancy was a future tenancy, and therefore there was no jurisdiction to fix a fair rent. The result of the evidence given before the Court at Derry was that the tenant had failed to bring the case within section 20, sub-section 2, and he had failed to prove that the landlord, when letting him in after the eviction in

1887, agreed to reinstate him as a present tenant. The order of the Sub-Commission fixing a fair rent must therefore be discharged, and the originating notice dismissed.

Land Com.
January,
1898.

LAND COMMISSION.

Land Com.
March 6,
1897.

(Before BEWLEY, J., and HON. G. FITZGERALD, Q.C.,
Commissioner.)

Johnston v. Anketell.

*Improvements made before execution of lease—Land Law
(Ireland) Act, 1896, s. 5, and sub-s. 8.*

BEWLEY, J.—The old rent in this case was £80, and the judicial rent £55. The circumstances of the case were somewhat peculiar. The holding was held under a lease bearing date 24th March, 1882, for a term of 80 years at a rent of £80 a-year. Prior to the execution of the lease the tenant had made considerable improvements upon the land, the total amount of drainage, for instance, being 5,700 perches. There was also some reclamation and construction of farm roads. On behalf of the landlord it was contended by Mr. Hume that the taking of the lease must be regarded as satisfaction for a considerable portion at least of these improvements. The lease was expressed to be made in consideration of several large sums of money expended by the lessee in improvements upon the premises; and it also contained a most important provision towards the end, by which it was agreed between the parties that on the determination of the lease, by forfeiture or otherwise, the tenant should be entitled to compensation for all improvements heretofore, now, or hereafter executed by him on the demised premises; and should also be

Land Com.
March 6,
1897.

Johnston
v.
Anketell.

Bewley, J.

entitled to the full benefit of the Land Acts of 1870 and 1881, or any Acts amending or altering the same. Now, by the Land Law (Ireland) Act, 1896, it was provided, sec. 1, sub-section 5, that, "for the purpose of the Land Law Acts, as amended by that Act, a tenant shall not be deemed to have been paid or compensated for any improvement not made in pursuance of a contract entered into for valuable consideration, except when the Court, having regard to all the circumstances of the case, are of opinion that valuable consideration has been given by the landlord in respect of the improvement ;" and by sub-section 8 of the same section it is provided : [Reads the section.]

In the present case the rent prior to the execution of the lease was £88 a-year, and the rent reserved by the lease was £80. Therefore Mr. Hume contended that under the sub-section the Court should treat the lease as being either entire or partial compensation for the improvements made prior to its date ; but the terms of the section are not that a mere letting at an abated rent should operate as valuable consideration, but if the Court held that the letting at a reduced rent should so operate, if the Court was satisfied that the reduction of rent took place with the object of recouping the tenant for the expenditure in capital and labour in making the improvement. In his opinion, in this case that was negatived by the express terms of the instrument ; for the lease provided that, in the event of its determining at any time, whether ten years or fifty years or seventy years, or at the end of the term of eighty years, the tenant would be then entitled to full compensation for his improvements. This showed, he was clearly of opinion, that the lease was not intended to satisfy or recoup the tenant in any way for his improvements ; and, accordingly, in fixing the rent, that they held this lease in no way debarred the tenant from being exempt from rent on his improvements, made both before and

subsequent to the execution of the lease. Now, in determining the amount to be deducted for improvements and buildings, the annual deduction made by the tenant's valuer was £24 10s.; the annual deduction made by the landlord's valuer was £26 13s.; but they intended to adopt the annual valuation of them made by their own Court valuers, £29 16s.; and on that basis they fixed the judicial rent at £60.

Land Com.
March 6,
1897.

Johnston
v.
Anketell.

LAND COMMISSION.

Land Com.
March,
1897.

(Before BEWLEY, J.)

Colclough Estate.

Buildings erected subsequent to 1850—Presumption as to adding proximity value in respect of—Land Law (Ireland) Act, 1870, sec. 5—Land Law (Ireland) Act, 1896.

BEWLEY, J.—There were a number of cases on the Colclough estate in reference to which two points were raised before them by the solicitor acting on behalf of the landlord. The first question related to the building on the holding; and it was urged that the recent Land Act of 1896 had in some way or other altered the law in this respect, and made it more favourable for the landlords than heretofore. In his Lordship's opinion that position could not be sustained. The improvement in the cases that came before them, of the nature of buildings, might be divided into two classes—those which were erected after the year 1850—that was a period of twenty years before the passing of the Land Act of 1870—and those erected at an earlier date. As to those erected subsequent to 1850, the presumption given by

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March,
1897.

*Colclough
Estate.*

Bewley, J.

the 5th sub-section of the Land Act of 1870, as ratified by the Land Act of 1896, applied, and they were to presume in ordinary cases that such buildings were erected by the tenant or his predecessor in title, except a specific class of cases pointed out by the statute. With reference to buildings erected prior to 1850, no presumption in law or fact arose; and it was for the Court to consider, having regard to the evidence, what was the presumption as to the erection of those buildings in considering whether the buildings were erected by the landlord or the tenant. They had in such cases, in his opinion, to have regard to what was proved to have been the practice on the estate in the cases that came before them. It had been shown, in the first instance, that those were old tenancies continuing in the same families for generations; and it had been shown also that the improvements erected in living memory of the nature of buildings had been erected by the tenants; and it was further proved that the additions and repairs of the ancient buildings had been made by the tenants. Under these circumstances, they were of opinion that in those cases they should treat the buildings as having been erected by the predecessor in title of the tenant in cases in which there was no positive evidence one way or the other. There was another point raised which hardly deserved notice—that if a tenant, at his own expense, erected buildings, whether dwelling-houses or offices, upon a farm, some additional rent in respect of the improvement must be given to the landlord under the head of proximity. Such a disposition seemed little less than absurd, and it was wholly untenable.

LAND COMMISSION.

Land Com.
January,
1898.

(Before MEREDITH, J.)

Kelly v. Sir Charles des Voeux.

*Improvements made in pursuance of covenant in a lease—
Railway guarantee, payment of, by tenant.*

MEREDITH, J.—In this case, following the decision of Sir E. Bewley in *Miller v. Montgomery*, they held that the tenant was not entitled to be exempted from rent in respect of improvements made in pursuance of a covenant contained in the lease, and it would be necessary to reduce the drainage allowed to the tenant (40 acres) by 6 acres. But, on the other hand, there was an addition made to the rent for half the railway guarantee. The Court thought that if they allowed this to stand in the schedule as at present, it would be practically making the tenant pay the entire of the railway guarantee, when, according to the Act of Parliament, one-half was to be borne by the landlord and one-half by the tenant. They, therefore, set one off against the other. The former rent was £160, judicial rent £138, which they confirmed.

Case stated.
February 15,
1898.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before ASHBOURNE, C., FITZGIBBON, HOLMES, and
WALKER, L.JJ.)

Templetown v. Fulton and others.

This case came before the Court on a case stated by the Land Commission. Twenty-three tenants on the estate of Lord Templetown had entered into an agreement fixing fair rents from the 1st November, 1881. In October, 1896, they served notices to have a second statutory term fixed; but the Land Commission held that these notices were premature, and should be dismissed, unless cause were shown to the contrary. If the term was to date from November 1st, 1881, as provided by the agreement, the notices would not be premature; but the Land Commission held that the date should be from the making of the agreement. Counsel for Lord Templetown consented to the statutory term being taken as from the 1st November, 1881; but the Land Commission held that they had no power to take his consent.

The Court held that the judicial tenancy should date from the time specified in the agreement, and that the originating notices were consequently not premature.

APPEAL.

(Before FITZGIBBON, L.J.)

Omagh.
July 16,
1897.

DILL v. O'Neill.

*Land Law (Ireland) Act, 1896, sections 10 and 11—
Settled Land Act, 1882, section 48, sub-section 1—
Land Law (Ireland) Act, 1881, section 58.*

Hugh O'Neill, the tenant, entered into possession of a farm about 1860, let to him by the Rev. James Reid Dill, Presbyterian minister at Dromore. Two tenants had been previously in occupation of the farm, which is a portion of the manse farm, sub-let by the Presbyterian minister. It was admitted in the case that originally Mr. Dill, the Presbyterian minister, had been absolute owner of the lands, and that previously he had executed a deed conveying the lands to trustees, to hold in fee for the benefit of the congregation, subject to a rent of £20 a-year, payable at his death or on his ceasing to be minister. The tenant's farm was separated from the other portions of the manse farm by a mearing fence, and it had been proved that he had improved the lands and built a house upon the farm. There was a memorandum of a lease drawn up and duly signed between the Rev. Mr. Dill and the tenant. It bore date the 19th of November, 1866, but it was proved that the tenant had been in occupation for several years before—in fact, before the execution of the trust deed by the Rev. Mr. Dill—at the same rent, £5 a-year. When the Land Act of 1887 was passed, a fair rent was fixed, namely, £4 a-year, and this decision of the Sub-Commission was affirmed on appeal, the appeal having been taken by the landlord. The Rev. Mr. Dill died in September, 1896, and then the trustees brought an ejectment against the

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Omagh,
July 16,
1897.

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tenant, contending that his interest in the farm ceased on the death of his landlord. The County Court Judge granted a decree for ejectment, and the tenant appealed.

FITZGIBBON, L.J., was of opinion that Mr. Dill, after the execution of the trust deed, was merely a permissive occupant, and not a limited owner. He affirmed the decree of the County Court Judge.

SUB-COMMISSION.

Sub-Com.
April,
1897.

(Before BAILEY, A.L.C.)

Cowan v. Alexander.

Land Law (Ireland) Act, 1896, ss. 5 and 50.

A former application in 1887 to fix a fair rent was refused on the ground that the holding was non-agricultural.

BAILEY, A.L.C.—This is an application to fix a fair rent on a holding which, when let under lease in 1860, had on it a substantial corn-mill, as well as a scutch-mill. About 1866 the water supply by which the mills were worked was practically stopped owing to the drainage of Monteith Bog, or Lake, whence the supply came. The result was that the mill ceased to be worked, except to a very limited extent, for the past thirty years. The mill value of the holding has almost disappeared since 1869. The area of the holding is 24a. 1r. 7p., and the rent £45. The holding was undoubtedly a mill holding in 1861, when the lease was made. The question then arises, Can a holding change its character owing to external circumstances—owing to circumstances independent of the action of the lessee? A lessee can turn an agricultural holding into a non-agricultural. It is doubtful whether he can convert a non-agricultural

into an agricultural. But I do not see why circumstances could not do so for him. If a lessor lets a mill and water-power, together with a farm of land, for a term of years, and during the term the water-power on which the milling was dependent so disappears as to make the substantial user of the land agricultural, I think we have a case where a non-agricultural holding may be converted into an agricultural. The landlord let a certain property to a tenant having a well-defined character. That character is changed by the disappearance of a certain essential element. Can it be alleged that the original character is still to continue where an essential element of that character has vanished? Having regard to the absence of direct authority on the point, I have some doubt as to how it will be ultimately decided. We are of opinion that the holding is now and was at the passing of the Act of 1896 substantially agricultural, and as such we fix a fair rent at £26.

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April,
1897.

Cowan
v.
Alexander.

Bewley,
A.L.C.

The above decision was reversed by Bewley, J., at Belfast in November, 1897, his Lordship, holding that the order made by the Sub-Commission in 1887, dismissing the tenant's application, was a "flat bar" to his renewing his application under the Act of 1896.

SUB-COMMISSION.

Sub-Com.
May 20,
1897.

(Before BAILEY, A.L.C.)

Robinson v. Gordon.

Land Law (Ireland) Act, 1896, s. 5—Separation of mill from agricultural portion of a holding.

This was an application by James Robinson to have a fair rent fixed on his holding at Balloo, near Killinchy, containing 25a. 3r. ; yearly rent, £60 ; held under A. H. Gordon.

Sub-Com.
May 20,
1897.

Robinson
v.
Gordon.

The application came before the Court under section 5, sub-section 2, of the Act of 1896. The tenant held under a lease dated in 1831 for three lives, and the premises in the lease were described as a water corn mill and mill-dam in Balloo, and also a farm containing 20 acres, Cunningham measure. The present tenant purchased at a sum of £500 in 1888, and his contention was that at the date of the lease the land was a substantial part of the holding, and not the mill, and therefore the Court were entitled to exercise the power conferred upon them by the section. Since the date of the lease the tenant had improved the mills, and made them into substantial buildings.

The application was dismissed.

Assizes:
March 26,
1898.

ASSIZES.

(Before KENNY, J.)

Hanson v. Mercer and Marshall.

Mortgagee—Surrender—Assignment—Land Law (Ireland) Act, 1881, secs. 20 and 57—Land Law (Ireland) Act, 1896—Civil Bill Act, sec. 81.

The plaintiff had obtained from the defendant Mercer, on the 15th May, 1889, a mortgage of the farm, and secured a sum of £5 13s., and the mortgage was duly registered. The interest had been paid up to about five and a-half years ago by Mercer. Prior to the issuing of the civil bill the plaintiff had discovered that the defendant Mercer had purported to surrender his holding to the landlord, and that the landlord had made a temporary letting to the co-defendant Marshall. The plaintiff then issued a civil bill to recover possession on his mortgage. It was proved on behalf of the defendant that an agreement had been entered into

between the landlord and Mercer about a year ago for the surrender of the holding ; that at the date of such agreement the agents for the landlord had no notice of the mortgage ; and that subsequently notice was served upon them by the plaintiff's solicitor. It was alleged that possession was given up to the landlord under this agreement, and that Mercer's wife was allowed to remain in possession of the house on the farm. In the Court below Messrs. Martin, King, French, and Ingram, who were agents for the landlords, appeared as solicitors for Hanson, and Mr. J. E. Proctor as solicitor for Marshall. At that hearing Mercer's solicitors were challenged to produce the alleged agreement, but he refused to do so. Mr. Ingram, who was examined on the appeal on behalf of the defendants, stated that the agreement had been lost, and that, although he had searched for it, he had been unable to find it. Mr. John Leech (instructed by Mr. B. H. Lane) appeared for the plaintiffs, and Mr. D. S. Henry, Q.C. (instructed by Mr. J. E. Proctor), appeared for the defendants. It was contended on behalf of the plaintiff that the defendant Mercer was estopped by his deed of mortgage from denying the tenancy, and that Marshall, who had at the date of the issuing of the civil bill crops upon the land, was a necessary party. For the defendants it was submitted that Mercer was, notwithstanding the mortgage, a tenant of the holding within the meaning of the Land Act of 1881, and was therefore competent to surrender the tenancy, and in this way defeat plaintiff's mortgage. It was also contended that the landlord had an interest under the alleged agreement for surrender, and should, therefore, have been served with a civil bill. Mr. Leech, in reply, contended that no actual surrender had taken place, and that the only person competent to surrender the holding was the plaintiff as the legal owner under the mortgage of the holding, and that his status in this respect was not varied by the Land Act of 1881 ;

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1898.

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1898.

and section 19 of the Land Act of 1896 was also relied upon for this purpose.

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Marshall.

Kenny, J.

KENNY, J.—Three questions were raised in the case. The first was under the 20th section of the Land Act of 1881 as to whether there was a surrender of the holding, and under the 57th section of the same Act as to the definition of the tenant. The second question arising under the first section of the Act of 1881 was as to whether the assignment was good, and whether the provisions of that section had been complied with and the legal estate transferred to the assignee. The third question arose under the 81st section of the Civil Bill Act, as to the persons who were necessary to be served with the civil bill. He held that the 20th section of the Act of 1881 includes every possible case in which possession had been resumed by the landlord, and that the defendant Mercer was the tenant of the holding within the meaning of the 57th section, and therefore that he was in a position to surrender the holding within the meaning of the 20th section, notwithstanding the mortgage; but in point of fact he held there had been no such surrender proved, and he commented upon the fact that the agents for the landlord appeared in the court below on behalf of the tenant, and that they had refused, though challenged, to produce the alleged agreement for the surrender, and stated that there was everything in the case to raise suspicion as to the extent of the surrender. He referred to the case of *Farrelly v. Waller* (*ante*, p. 265), which had been cited in the argument, and to the judgment of the Chief Baron in that case, in which the learned Chief Baron had stated that if the assignment within the meaning of the first section of the Land Act of 1881 had changed the legal estate, so also would it change the tenancy. In his Lordship's opinion that was only a dictum of the Chief Baron to which he was not bound, and which was unnecessary as far as he could see for the decision of the

case. But if the Chief Baron did mean to decide that the legal estate would not pass under such an assignment, and that in no case could the tenant of the holding within the meaning of the Act legally transfer his interest without giving notice under the first section of the Act of 1881, then, with the greatest deference to that distinguished Judge, he could not follow him. His Lordship held that the Land Commission only could set aside such a sale, as the legal estate was vested in the assignee, and therefore he affirmed the decision of the Recorder, and granted a decree on the ejectment. Mr. Henry asked his Lordship to state a case on the first and second questions raised for the opinion of the Queen's Bench Division. His Lordship said he would consider whether he would do so.

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LAND COMMISSION.

Land Com.
March 6,
1897.

(Before BEWLEY, J., and FITZGERALD, Q.C.,
Commissioner.)

Bailey v. Newton.

Redemption of Rent (Ireland) Act, 1891.

Holding demised by lease for 999 years to the trustees of
Clogher Presbyterian Congregation.

Held, not to be an agricultural holding.

Noonan v. Cunningham (ante, p. 330) referred to.

The Sub-Commission fixed a fair rent (see ante, p. 33).

The Land Commission reversed the decision of the Sub-Commission, and the Court of Appeal subsequently confirmed the decision of the Land Commission.

Sub-Com.
March 10,
1897.

SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Cummins v Tyrrell.

*Bonâ fide occupation—Land Law (Ireland) Act,
1896, sec. 7.*

BAILEY, A.L.C.—In this case the landlady raised the question of sub-letting. The tenant does not live on the holding, but the dwelling-house thereon is sub-let to his daughter, who keeps a shop, and pays a rent of £6 10s. a-year. Now, under the Act of 1896, sec. 7, the tenant shall be deemed to be in occupation, notwithstanding the sub-letting of any dwelling-house on the holding, "not being the dwelling in which the tenant for the time being resides." The words of exception are curious. It is not easy to understand how the tenant can sub-let the dwelling in which he resides. The verb in the sentence is in the present indicative tense; and in strict grammar I do not see how a tenant could be excluded under the exception unless he were living in the house with his own sub-tenant. To give any other meaning to the section, we should read the present tense as if it were the past tense. This I do not think we are at liberty to do. The house here sub-let is not the house in which "the tenant for the time being resides." We accordingly must hold that the tenant is in *bonâ fide* occupation of the holding, and is entitled to have a fair rent fixed.

LAND COMMISSION.

Land Com.
May 31,
1897.

(Before BEWLEY, J., and HON. G. FITZGERALD, Q.C.,
Commissioner.)

Campbell and Duffin v. Casement.

*Land Law (Ireland) Act, 1881—Bonâ fide occupation—
Sub-letting.*

These holdings were in the Union of Ballycastle, in the County of Antrim. The tenant, Henry Campbell, held $32\frac{1}{2}$ acres at a former rent of £16 5s., reduced by Mr. Greer's Sub-Commission to £8, the Court valuer's valuation being £10 5s.; and James Duffin, who held 9 acres; old rent, £5; judicial rent, £3 10s.; and Court valuer's valuation, £4. Both these holdings are situated in the picturesque Vale of Glenariffe, in Antrim, which is being developed by the Belfast and Northern Counties Railway. In the case of Henry Campbell, the landlord urged that the case should be dismissed on the ground that he had sub-let a portion of his holding. The evidence was that the Northern Counties Railway Company paid the tenant 30s. a-year for allowing tourists to walk along his land to the waterfall of Glenariffe. In Duffin's case it was contended that the holding was not agricultural or pastoral; and this rested upon the fact that the railway company had erected a wooden building upon what the tenant described as a rock, and in this the tenant supplied hot water and crockery to tourists desirous of indulging in tea. In Campbell's case the appeal rent was fixed at £10 5s., and in Duffin's case at £4.

Appeal.
June 18,
1897.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before ASHBOURNE, C., FITZGIBBON and
WALKER, L.JJ.)

Cowell v. Buchanan.

*Redemption of Rent Act—Land Law (Ireland) Act,
1896—Application of tenant to fix a fair rent, pre-
viously dismissed—Redeeming portion of a rent.*

The case came before the Chief Land Commission in December, 1891, on an appeal by the landlord to set aside the tenant's notice under the Redemption of Rent Act, 1891. The holding contains 329a. or. 9p., statute measure, and is held under a fee-farm lease for ever, dated 22nd May, 1867, made by Thomas Bailey, the predecessor of Mrs. Cowell, the present landlord, to Christopher Buchanan, the father of the present tenant, at the yearly rent of £270. The originating notice was served by the tenant on 11th October, 1891, and by it the tenant sought to redeem his rent. The landlord applied to have the notice set aside on the ground that the tenant was not in *bond fide* occupation of the holding, and was therefore not entitled to the benefit of the Act. At the hearing in 1891 it was admitted that the tenant was not in actual occupation of a considerable portion of the holding, there being three under-tenants. Mr. Justice Bewley set aside the originating notice, with costs. The present proceedings were subsequently instituted under the Act of 1896, and, on re-hearing, Mr. Justice Bewley adhered to his former judgment, holding further that the Act of 1896 did not apply to redeeming a portion of a rent. From this decision the tenant appealed.

The Court upheld the decision of Mr. Justice Bewley, and dismissed the appeal.

Appeal.
June 18,
1897.

WALKER, L.J., said in this last puzzle he was rather disposed to take a different view from that held by his colleagues; but they agreed with Mr. Justice Bewley, and probably they were right.

Cowell
v.
Buchanan.

Decision of Land Commission affirmed, with costs.

See previous application, *ante*, page 217.

SUPREME COURT OF JUDICATURE.

Case stated.
March 1,
1897.

COURT OF APPEAL.

(Before ASHBOURNE, C., FITZGIBBON and WALKER
L.JJ.)

Dunne v. Nettles.

[*See page 222, ante, for report of this case before the Land Commission.*]

This case came before the Court of Appeal by way of case stated by Mr. Justice Bewley. The tenant served an originating notice to fix a fair rent for a second statutory term on the 2nd July, 1896. The first fair rent had been fixed by agreement dated 30th March, 1882, by which the old rent of £69 9s. 8d. was declared to be the judicial rent of the holding, payable on the 1st May and 1st November, the first payment to be on the 1st May, 1882. It was lodged with the Clerk of the Peace on 5th April, and was duly filed in the Civil Bill Court at the expiration of three months from that date. If the statutory term commenced as provided for in the agreement, fourteen years of the statutory term would have expired on the 1st May, 1896, and the tenant would have been entitled to serve his originating notice in July last;

Case stated.
March 1,
1897.
- -
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but if the term commenced on the filing of the originating notice, fourteen years would not have expired; and the Land Commission arrived at the conclusion that the governing date was not the making of the declaration, but the filing of it, and that the gale day next after the filing was the date from which the statutory term was to run.

Held, that the date from which the statutory term was to run was the date of the next gale day after the making of the agreement.

FitzGibbon,
L.J.

FITZGIBBON, L.J., said his judgment turned on the agreement between the parties in this case, and that alone. They had no jurisdiction to answer hypothetical questions, or to decide the rights of other parties on facts and documents which were not before them. The nominal effect of the Land Act, section 8, sub-section 6, was to turn the rent agreed upon into a judicial rent, and it produced this effect, according to the terms of the agreement. The judicial rent and the statutory term must be coterminous, and where a rent had been agreed upon and turned into a judicial rent, and the agreement took effect, there could not be a gap between the two rents. When the rent agreed upon became the judicial rent, the period from which it ran should be included in the statutory term. The decisive question, when the judicial rent commences, should be determined by the agreement in each case; and they could not tell, where the agreement was express on this point, what might be the effect of another agreement which might be silent, and as to the other terms, of which they knew nothing whatever. The agreement in this case was made during the currency of the gale ending May, 1882, and expressly provided that the first judicial rent to be paid under it should run from November, 1881—in other words, that the current gale should be included in the statutory term. This agreement was duly filed and became operative, and turned the rent falling due on the 1st May, 1882, into a judicial rent, and the term into a

statutory term. Any delay which arose, due to the exigencies of procedure in the Land Commission, could not affect this agreement. Therefore the decision of the Land Commission could not be sustained, and the tenant's originating notice was not premature. As to the second question, the assumption in it of the agreement and declaration containing no provisions as to the date at which the fair rent shall become payable was one not applicable to the case now before the Court. It was an assumption which made it impossible to answer this question, as it left the materials necessary for deciding it uncertain and insufficient. Where the agreement contains no provisions as to the date on which the fair rent becomes payable, it must be a question on the whole agreement as to when the statutory term commences. Its very silence might give rise to the presumption that it was not intended to operate until it was filed. The difference of phraseology might lead to a different conclusion. The very dates might be material to its construction. He could not say off-hand that the judicial rent and the statutory term might, even in all cases, run from the same date as where a rent which had been recovered by a judgment, or had been voluntarily paid after the making of the agreement and its filing, could *ex post facto* be turned into a statutory rent. He therefore confined his observations to the facts of the present case, and to those alone.

Lord Ashbourne and Walker, L.J., concurred.
Decision of Land Commission reversed.

Case stated.
March 1,
1897.

Dunne
v.
Nettles.

FitzGibbon,
L.J.

Land Com.
January 22,
1898.

LAND COMMISSION.

(Before MEREDITH, J.)

Elliott v. Farquhar.

Originating notice—Second Term application—Liberty to amend Notice refused.

MEREDITH, J.—This was an application by the tenant to amend his originating notice, dated October 30, 1896. The notice was in the form prescribed in the case of an application to fix a fair rent during the first statutory term ; but it appeared that an order was made on October 4, 1882, in respect of this identical holding, fixing a fair rent. Mr. Wray, the manager for Messrs. Harpur and Mills, solicitors for the tenant, had made an affidavit in which he said that, the tenant being old and infirm, the instructions for the originating notice were given by his wife, and she stated that no fair rent had been fixed. The originating notice having been served, the landlord, in April 28, 1897, served notice of an application to resume the holding. Some time between the service of the originating notice and the hearing of the landlord's application, the solicitor for the tenant became aware that an order had been made by the Sub-Commission on October 4th, 1882, fixing a fair rent ; but he made no application to the Court until the landlord's application to resume came on at Belfast on the 11th November last. The tenant then relied on the fact that the first statutory term was current. Afterwards the tenant's application came on. The chairman of the Sub-Commission (Bailey) called attention to the fact that it was on a wrong form, and he refused a motion to amend.

The Court was of opinion that he was right, and they refused the motion, with two guineas costs.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

Appeal.
February 7,
1898.

(Before FITZGIBBON, WALKER, and HOLMES, L.JJ.)

Gleeson v. Fry and another.

Land Law (Ireland) Act, 1881, s. 58—Pasture holding.

This was an appeal by the landlords from a decision of the Land Commission Court. On December 8th, 1897, the case was heard before Mr. Justice Bewley, the Hon. Gerald Fitzgerald, and Mr. Commissioner Lynch. The tenant holds a grazing farm in the Co. Westmeath, and he resides on a home farm in the Co. Roscommon, sixteen or seventeen miles distant. The question was whether the Westmeath farm was "ordinarily used with the holding on which the tenant resided." The Land Commission Court held that the farms were used together, and they reversed the order of the Sub-Commission dismissing the application. From this the landlords appealed.

The Court unanimously held that, as the farms were in different localities, different in use and character, and worked by different people, the Westmeath farm could not be said to be "ordinarily used with the holding on which the tenant resided." They, accordingly, reversed the decision of the Land Commission.

Land Com.
November,
1897.

LAND COMMISSION.

(Before BEWLEY, J.)

Byrne v. Dawson and others.

*Land Law (Ireland) Act, 1896, section 22—Appeal—
Grounds of appeal not stated in notice—Practice—
Amendment.*

*The notice of appeal merely stated "that the rent fixed
by the Civil Bill Court ought to be increased."*

BEWLEY, J.—This notice of appeal is bad and utterly irregular, but the tenant is not misled. Prior to the Act of 1896 any ground of appeal might be raised on any notice of appeal, and the result was in many cases embarrassing to the opposite side. Now, however, we can frame rules which will prevent persons from being taken by surprise. The tenant here is not practically damnified. I think, therefore, that under the general powers of amendment which we have we should amend by adding the words "on the ground that the acreable rent as fixed by the Civil Bill Court is insufficient." We cannot go into any question of improvements, fences, and so forth, but simply the acreable rent.

LAND COMMISSION.

Land Com.
February 2,
1898.

(Before MEREDITH, J., and the HON. GERALD
FITZGERALD, Q.C., Commissioners.)

Estate of Colonel FitzGibbon Hunt.

*Notice of appeal illusory—Where tenant alone appeals
landlord not entitled to re-open the whole case—
Inspection of Court valuer's report at hearing of
appeal.*

The landlord appealed in five cases from his estate in the County Carlow.

Mr. Healy, M.P., for tenants, said—Though the landlord alone had appealed, the tenants in every one of these cases maintained very strongly that they had been allowed an entirely inadequate sum for their reclamation of land. He did not know if the Court at any stage intended to let them see the Court Valuer's report. He thought, under the rules, that the tenant had some little title to protection in this matter of appeal, namely, as to what are the particular grounds of appeal in the case. The notice was perfectly illusory. It said that the rents should be increased, "inasmuch as excessive deductions had been made for land reclaimed and for drains made by the tenant, and that the acreable rent assessed on all the lands is too low." The Sub-Commissioners had gone over the lands, and divided them into various fields, and he respectfully said that the tenant was entitled to better and further particulars. He also submitted that the landlord should be put to go on first, and not have the tenant compelled to go through the performance of calling his valuers and witnesses.

Land Com.
February 2,
1898.

*Estate of
Colonel
FitzGibbon
Hunt.*

MEREDITH, J.—At any period of the sitting they would allow the Court Valuer's report to be inspected if both parties were represented. The report stated the gross rent and the deductions that would be made for improvements were not brought out. They would have to be deducted from the acreable rent; therefore it was not easy to see at a glance what the ultimate result would be.

Mr. Wakely said this was a re-hearing, and therefore the tenant should go on. As to the notice of appeal, this had followed exactly the form given in the rules.

MEREDITH, J., said that was so. It was the actual form prescribed.

Mr. Healy also contended that, though the tenant had not appealed, he was entitled to go into questions of improvement that had not been allowed by the Sub-Commissioners.

MEREDITH, J., said in cases on Lord Dufferin's estate, where the tenants appealed, it had been ruled that the landlord, not having appealed, could not re-open the whole case. It was an important point which they would rule in accordance with Mr. Justice Bewley's decision.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

Appeal.
February 21,
1898.

(Before ASHBOURNE, C., FITZGIBBON, WALKER,
and HOLMES, L.JJ.)

The Queen at the prosecution of the Earl of Gosford.

(*Markey v. Gosford.*)

This was an appeal from the decision of the Queen's Bench Division dismissing applications on behalf of the relator for writs of certiorari and mandamus to bring up the orders of the Land Commission made in two fair-rent cases (Rooney's case and Sheppard's case), with a view of quashing them, and compelling the Land Commission to re-hear and determine the cases according to law. The cases had been heard by the Land Commission in Armagh, in which county the estate is situated; and the orders made thereon were impugned on the following grounds:—

(1) that the order in the premise was made in excess of jurisdiction; (2) that the Land Commission, upon the re-hearing, acted upon evidence not given upon oath, or in open Court, or in the presence of the parties; (3) that the Land Commission, prior to re-hearing, referred the subject-matter to certain persons for a report, which was afterwards used as evidence upon the re-hearing; that the subject-matter for their decision was not a matter that had arisen before the Land Commission in determining any question relating to the holding, nor were said persons an "independent" valuer; (4) that the matters referred to said persons included matters of law and other matters which the Land Commission were not authorized to refer to them; (5) that there was no re-hearing as required by law; (6) that the Land Commission received and acted

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upon the said report as evidence upon the re-hearing without the same being verified upon oath in open Court, and in the presence of the parties ; (7) that the order is bad on the face of it, as it purports to be an affirmance on appeal, and not an independent order of the Land Commission ascertaining and determining the fair rent of the holding upon re-hearing ; (8) that the Land Commission, upon the re-hearing, neglected to ascertain and record, in the form of a schedule, the matters and things prescribed by the Land Law (Ireland) Act, 1896, section 1 ; (9) that, in purporting to ascertain and record in a schedule the said matters and things, the Land Commission upon re-hearing received and acted upon evidence not given upon oath or in Court, or in the presence of the parties.

Ashbourne, C.

ASHBOURNE, C.—This appeal from the Queen's Bench Division raises some important questions in reference to the Land Commission. The Land Commission is not, in the technical sense, a Superior Court, but it has jurisdiction to determine all questions of law and fact ; its proceedings must be regarded as the judicial proceedings of a Court of Record, and in reference to it *certiorari* is taken away. But notwithstanding that *certiorari* has been taken away, it is contended that that writ should issue in the present case on two grounds—first, because the order of the Land Commission is bad on its face ; and, second, because it is alleged there was error in law in the action of the Land Commission in reference to the report of the valuers. These points are quite distinct, and must be dealt with separately. The first turns upon what is called “the pink schedule,” which is prescribed by the 1st section of the Irish Land Act of 1896. This Court, in the case of *Cope v. Cunningham* (1897, 2 Ir. Ref. 467), laid down with absolute clearness that the enactment applied to the head Land Commission itself as well as to the County Courts and Sub-Commissions, and that is not a position which it is for a moment sought to question. In that case, acting

under their impression as to the law, the head Land Commission had omitted altogether to fill the pink schedule. They had no pink schedule at all, and we were all clearly of opinion that the enactment relating to that document plainly applied to them, and that it was their duty to comply with it. The present case, of course, differs entirely from *Cope v. Cunningham*. The order of the Land Commission is accompanied by a pink schedule, and the allegation of the appellant is that their order is bad on its face in consequence of the way that schedule has been filled. The objections taken may be shortly stated, and are two in number. First, it is alleged that "the nature and character" of two of the improvements—"fences, £70; buildings, £350"—are not adequately described. It is alleged that the length, situation, and character of the fences are not stated, and that the description of the building is not sufficiently full. I do not say at all that the description of fences and buildings might not be made more precise; but I am clearly of opinion that on this application we could not hold the objections well-founded. Second, it is urged that the schedule states, under the heading of "such other matters in relation to the holding as may have been taken into account in fixing the fair rent thereof," that "the holding is subject to the Ulster tenant-right custom," but that no sum is stated to have been deducted in respect of it. If a deduction had, in fact, been made from what would otherwise have been the fair rent on account of the Ulster tenant-right custom, it should naturally have been specified; but it may have been considered without any deduction having been made. There are many usages comprised in the general description of "Ulster tenant-right custom," and there is nothing in the schedule to compel us to infer that under the usage to which this holding was subject, taking it fully into consideration, there was anything to justify any deduction in addition to those

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already specifically stated. In my opinion, therefore, there is nothing to support the first objection—that the order is bad on its face. Holding, then, the order to be good on its face, it remains to consider the second objection, alleging error in reference to the valuer's report. Having regard to the power and jurisdiction of the Land Commission, mere mistake in law on their part would not support this application. From the mass of cases showing this, it will suffice to refer to the case in the House of Lords of *The Overseers of the Poor of Walsall v. London and North-Western Railway*. But the powerful argument addressed to us by Mr. Ronan and Mr. Campbell contended that the action of the Land Commission in reference to the valuers' report was not mere error of law. They assert that the Land Commission exceeded their jurisdiction in the wide reference they made to the valuers, that the valuers' report was, therefore, unauthorized, and that its consideration by the Land Commission was calculated to cause "a real bias" in their mind, and therefore destroyed their judicial competency. The express statutable power of the Land Commission to employ independent valuers to make a report to them, is found in section 48, sub-section 4, of the Irish Land Act of 1881. That section authorizes the Land Commission, determining any question relating to a holding, to direct an independent valuer to report to them on any matter they may desire to refer to him, and, if they think fit, to adopt his report; and they have further authority to direct that the valuer should accompany his report with a statement of all such "facts and circumstances as may be required to enable the Land Commission to form their judgment on the subject-matter of the report." In the present case it is argued that there was no order of reference, or, in any event, no power to refer to more than one valuer. But the Land Commission followed in the present case the practice they had maintained since 1881; and it would be unreasonable now to

allow this practice to be questioned, when the valuers set in motion by the machinery duly reported to the Land Commission. The two valuers started on their work by the Land Commission were asked to report (1) whether they concurred with the schedule recorded by the Sub-Commissioners, and also with their conclusion as to the fair rent ; or (2) if they saw reason to differ substantially, then to report the matters as to which they differed, and the consequent variations in the fair rent. Thus many wide questions, involving practically the entire schedule of the Sub-Commission, and their conclusion as to fair rent, were referred to the valuers for their report. The report of the valuers was sent to each of the parties from the Land Commission, accompanied by a perfectly fair and proper letter, saying that the Commission considered both parties should be informed of the result, and that it rested with the parties to prosecute or withdraw their entries for re-hearing, and that they were not bound to accept the Court valuer's estimate of the rent. The report was considered, and presumably acted on, and used by the Land Commission as they thought fit. The appellant contends that the action of the Land Commission in relation to this report involves such error as to vitiate their order—that they had no authority to make such a reference or act on such a report. The argument shortly is, that asking for and using such a report gave them a “real bias,” and took away their judicial independence and competency ; and the judgment of Lord Blackburn in the case of *The Queen v. Rand* (L.R. 1 Q.B. 273), and other authorities, have been referred to in order to establish the contention. It is only fair, however, to bear in mind the explanation of their motives and action in reference to this report given in his affidavit on behalf of the Land Commission by their officer, Mr. Seaver.

[His Lordship here read the lengthened affidavit.] But the Commissioners never referred to them the question

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whether the tenant was entitled in point of law to any deduction in respect of improvements. This affidavit, carefully framed and deliberately put forward by the Land Commission, states what they intended in asking for a report; and its whole structure conveys that their order was their own independent judicial act, quite free from the vice of "real bias" imputed by the appellant. I am by no means prepared to concur in the assumption that the reference was unauthorized when rightly understood. The sub-section 4 of section 48 is extremely wide as to the matters, facts, and circumstances which the Land Commission can refer to a valuer; and if the word "valuer" is taken as the key, then the reference only asks for such report as a valuer could make in reference to the matter referred. He is not asked to report on any matters of law connected with the schedule or with the fair rent; and there is ample scope for a perfectly legitimate report from him as a valuer on the facts. But even allowing that the reference to the valuers was too wide, and not sufficiently guarded in its terms, and that more care might have been taken to direct them not to wander into disputable regions of mixed questions of law and fact, would that carry the contention of the appellant? The Land Commission, as I have already said, is a Court of Record, with full jurisdiction to determine all questions of law and fact, with the writ of *certiorari* taken away; and if in the *bond fide* exercise of its powers they do make a mistake in the extent and terms of a reference they are expressly authorized by statute to make, that is then a mistake in law which any tribunal might honestly make, and cannot be reached by *certiorari*. If a report, open to objection by reason of its undue width, were sent in to the Land Commission, I infer from the affidavit of Mr. Seaver that the Land Commissioners would feel bound to disregard anything in it which appeared to intrude into questions of law, or

mixed questions of law and fact, and exercise their own independent judgment in arriving at a conclusion framing their order. Here the Land Commission appear to have acted in the belief that they were, and with the intention that they would keep, within the statute; and I am clearly of opinion, for the reasons I have stated, that in this second ground relied on by the appellant no case whatever has been made for the writ of *certiorari* asked for, and that no jurisdiction to issue it has in fact been shown. It is unnecessary to add anything on the application for a *mandamus* to the Land Commission. Once the order already made is held to be good on its face, and that it cannot be quashed, it is manifest that the Land Commission could not be ordered to hear and determine as if that order were not in existence. In my opinion, the order of the Queen's Bench was right, and should be affirmed. We have carefully considered the question of costs, which has caused some difficulty; but considering that the effect of the appeal will be to alter the practice of a great department, we will allow the parties to bear their own costs.

Lords Justices FitzGibbon, Walker, and Holmes, in lengthened judgments, concurred.

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SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Martin v. Smyth.

Determination of a tenancy under the Ulster tenant-right custom—Mode of transfer on a sale to incoming tenant—Creation of a new tenancy not necessarily to be deemed to be the creation of a future tenancy.

BAILEY, A.L.C.—It is contended on behalf of the landlord that the applicant here is a future tenant. In 1889, during the currency of a statutory tenancy, the interest in the farm was put up for sale, and was purchased by Martin, who now applies to have a fair rent fixed for a second judicial term. The purchaser, on entering into possession, signed an agreement with the landlord to take the holding as tenant from year to year at the existing judicial rent. The tenant swears that he bought the tenant-right of the holding under the Ulster tenant-right custom, which prevailed on the estate; and that in signing the agreement with the landlord he did not intend to destroy his rights as purchaser of a present tenancy; and that he did not think that the agreement would have any such effect. Under the general law before the passing of the Land Act of 1881, the signing of such an agreement as is here relied on would unquestionably have resulted in the creation of a new tenancy. The 20th section of the Act of 1881, however, provides that a tenancy to which the Act applies shall only be deemed to have determined when the landlord has resumed possession of the holding on certain eventualities. The sale in 1889 was under the Ulster custom. It was a sale of the tenant-right in the holding. The

question then is: Will such a sale, when followed by the signing of an agreement for a new tenancy between the landlord and the purchaser, operate to determine the existing tenancy, and make the new tenancy a future tenancy; or will such new tenancy be deemed to be a present tenancy? Before answering this question we must consider the intentions of the parties, and the method in which the interest in an Ulster tenant-right holding was usually transferred to a purchaser under the custom. It is clear that the purchaser (Martin), at the sale in 1889, did not intend to acquire a future tenancy. He thought he was buying a present tenancy to which the Land Act applied. He bid for and paid for an existing present tenancy, and thus got into privity with the outgoing tenant. He then proceeded to get into privity with the landlord by signing an agreement with him to take the lands under a tenancy from year to year. To interpret that agreement aright we must consider what was the usual course of procedure in transferring tenancies under the Ulster custom. The ordinary method was not by an assignment from the outgoing tenant, but by a surrender by operation of law of the tenancy purchased by the incoming tenant, and the taking by him of a new tenancy. (*Stevenson v. The Earl of Leitrim*—Donnell's Reports, p. 368.) But this surrender was not intended to operate as a destruction of the customary rights of the occupying tenant. It was merely a convenient way of transferring the holding and the tenancy therein to the purchaser, who thereupon acquired all the rights of the outgoing tenant. All sales under the custom in strict law result in the creation of new tenancies. (See PALLES, C.B.: *Hillock v. Cope*—Donnell's Reports, p. 481.) This being the manner in which Ulster custom holdings were and are passed from one tenant to another, we must hold that the attendant creation of a new tenancy shall not "be deemed" to have determined the existing present tenancy within

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Sub-Com. the meaning of the 20th or any other section of the Act
 March, of 1881. It is an incident of the custom which, like all
 1897. other essential incidents, is legalized by section 1 of the
Martin Act of 1870. It may be argued that the agreement of
 v. February 19th, 1889, was inconsistent with the Ulster
Smyth. custom, and in effect destroyed it, containing, as it did,
 Bailey, A.L.C. various restrictions on the method of user of the holding,
 and providing that the tenancy should be one from year
 to year. The agreement in *Stevenson v. Leitrim* (Don-
 nell, p. 340) was, however, more stringent in its provi-
 sions, and yet was held not to have affected the right of
 the tenant under the custom. "When a holding has
 been shown to be subject to the usage," said Mr. Justice
 Lawson, "it can only be discharged from it by proof of
 an agreement between the landlord and the tenant that
 the landlord shall have the land discharged of the usage,
 and that the tenant shall surrender his right under it."
 I am, accordingly, of opinion that the tenant here is a
 present tenant, and as such is entitled to apply to have
 a fair rent fixed for a second statutory term.

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 January 28,
 1898.

SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Rainey v. Duke of Manchester.

*Present Tenancy—Land Law (Ireland) Act, 1896, section
 50, sub-section 2.*

This was an application to fix a fair rent on a holding
 near Tandragee of 23 acres, at a rent of £29 8s. 4d. In
 1884 an application to fix a fair rent had been dismissed
 on the ground that the tenancy was a future tenancy.

BAILEY, A.L.C.—It is argued in this case that the
 order of the Land Commission, dated July 9th, 1884,
 dismissing the application made to have a fair rent

fixed on the ground that the tenancy in the holding was a future, not a present, tenancy, is a bar to the present application. Section 50 of the Land Law Act, 1896, sub-section 2, says—"An application to fix a fair rent for a holding shall not be refused on the ground of any previous decision with reference to the holding or any part thereof, whether between the same parties or otherwise, if such application can be sustained under this Act, or any of the Land Law Acts as amended by this Act." Messrs. Barton and Cherry in their note on this clause say—"The effect of this sub-section is to enable a tenant whose case was dismissed before the passing of this Act to again bring it before the Court, even though no change may have been made in the law applicable to the case by this Act." This note seems to me to express shortly the effect of the section. The question then is, Can the application now be sustained under any of the Land Law Acts? Certain rent receipts have been produced before us by the tenant, which clearly show a present tenancy, or which estop the landlord from denying that it is a present tenancy. These receipts were not produced in evidence in 1884, which will apparently account for the dismiss then given. One of these receipts is dated 22nd March, 1882, and is for the sum of £105 5s. 7d., for balance of rent due, and was given by the agent of the landlord to the predecessor in title of the tenant. The second receipt is dated 1st February, 1883, for £34, being for one year's rent, due to November 1st, 1882. Rent receipts have been given regularly since. The receipts thus show a tenancy in the lands in the years 1881 and 1882. If there had been no previous hearing and decision, we are of opinion that on the evidence before us the tenancy is a present one. That being so, we are also of opinion that the former dismiss is no bar to the present application, and we accordingly fix a fair rent at £20 10s.

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SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Finnigan v. Hutchinson.

*Present Tenancy—Land Law (Ireland) Act, 1896, sections
18 and 50.*

BAILEY, A.L.C.—This holding consists of 4 acres 2 roods and 15 perches, at a rent of £6 17s. 10d. It was dismissed as a future tenancy by Mr. Davys Tuckey, by order, dated 12th January, 1889. As I have pointed out in *Rainey v. Duke of Manchester*, I do not consider that the former order dismissing the application is a bar to our hearing a new application under the Act of 1896. The question now is, Can the application be sustained under the Act? It is not disputed that the order of Mr. Tuckey was right; but Mr. Harris now argues that the subsequent proceedings between the parties and their successors in title set up a present tenancy. The evidence of the tenant is that in 1891 he purchased the holding from the representatives of Laverty, the previous tenant, for £34, under conditions of sale which specified that the holding was under a judicial tenancy. He was subsequently accepted as tenant by the landlord, who, however, gave him a receipt as representative of Laverty. On the next occasion on which he went to pay rent he said he would not pay on such a receipt; that he bought the holding as subject to a judicial or present tenancy. The landlord in his evidence says that he gave a receipt in the ordinary form to avoid squabbling, "as the tenant would not pay rent as a future tenant. I should have," he said, "given the receipt as a future tenant, as Mr. Atkinson, my solicitor, advised me; but Finnigan would not pay

the rent with such a receipt, so I foolishly gave him a receipt in the ordinary form." We are of opinion that by his dealings in this case the landlord brought himself within section 18 of the Act of 1896. Where prior to the commencement of this Act the landlord of a holding has consented that the tenancy in the holding should be a present tenancy, or that the tenant should have the same rights as a present tenant, the tenancy shall be deemed to be a present tenancy accordingly. By his action the landlord undoubtedly led the tenant to believe that he had a present tenancy, or that he had the same rights as a present tenant in the holding, and we think that the tenant is entitled to have a fair rent fixed. We think the judicial rent should be £5.

Sub-Com.
January 28,
1898.

Finnigan
v.
Hutchinson.

Bailey, A. L. C.

LAND COMMISSION.

Land Com.
March 12,
1898.

(Before BEWLEY, J., HON. GERALD FITZGERALD, Q.C.,
and LYNCH, Commissioners.)

Reps. John Kirkpatrick v. M'Coy.

*Land Law (Ireland) Act, 1881—Present and future
tenancy—Alterations in form of receipt given to
tenant.*

The tenant held 5a. 2r. op. near Crumlin, at a rent of £12, reduced by the Sub-Commission to £6 12s. 6d. The landlord appealed on the ground that the holding was not agricultural, that the letting was temporary, and that there was no tenancy in the applicant.

The tenant, Matilda Kirkpatrick, deposed that her father, John, got the holding forty-five years ago. He died in 1884, and was succeeded by her mother, Eleanor, who died four years ago. Witness, in 1896, took out

Land Com.
March 12,
1898.

*Reps. John
Kirkpatrick
v.
M'Coy.*

letters of administration to her father. There was a small house, barn, and byre in the place.

Receipts were produced showing that in 1884 the rent of the house and holding was £14 a-year; but from 1893 and onwards the house was let at 1s. 6d. a-week, and the land at £8 2s., separate receipts being given.

Miss M'Coy, the landlord, examined by Mr. Whittaker.—In 1892 Mrs. Kirkpatrick signed an agreement. Witness was, about that time, purchasing the fee of this holding from the Wallace estate. She sent the agreement into the estate office. It was sent to the Land Commission, and she never got it back. The Land Commission did not sanction the purchase.

Cross-examined by Mr. Greer—Was your object in getting that agreement signed to get a surrender of this holding, or was your object to facilitate your purchase in the Land Commission? My object was to facilitate my purchase. I never intended to remove Mrs. Kirkpatrick.

MR. JUSTICE MEREDITH.—Or to change the tenancy? Not in her time. I was wanting to get it bought out.

MR. JUSTICE MEREDITH.—We never could hold that that altered or affected the tenancy in John Kirkpatrick. His representative is before the Court; and it is quite obvious the rent must be fixed on the holding as an entire holding.

Decision of Sub-Commission (Tuckey, A.L.C.) affirmed.

SUB-COMMISSION.

Sub-Com.
February 24,
1898.

(Before TEELING, Q.C., A.L.C.)

Cooney v. Reps. Nixon.*Land Law (Ireland) Act, 1881—Non-agricultural—Residential.*

The holding, which is known as Lake View, is situated opposite the Royal School of Portora, within a mile of the town of Enniskillen. It contains 28a. 2r. 22p. statute, portion of which is under water. The poor-law valuation is £60 10s., of which £29 10s. is on buildings. The buildings consist of a dwelling-house, gate-lodge, coach-house, stable, byre, and calf-house, all of which are slated. The holding was first taken by the tenant, Mr. William Rutherford Cooney, a leading merchant carrying on business in Enniskillen, under a lease dated the 28th January, 1876, from the late Mrs. Louisa Mary Nixon, for a term of ten years from the 1st February, 1876, at the yearly rent of £115. In the lease the premises were described as "all that and those the house and demesne of Lake View, situate in the townlands of Portora and Drumlion, with the offices and buildings thereon, containing 20a. 2r. 22p., statute, or thereabouts. On the execution of this lease the tenant and his family, who had been previously residing in Enniskillen at the premises in which the tenant carried on his business, went to the demised premises, where he has since resided. On the termination of the lease in 1886, negotiations for a new lease were entered into; and on the 8th October, 1886, a second lease was granted to Mr. Cooney for a further term of ten years from the 1st of February, 1887, at a reduced rent of £90, subject to a deduction of £10 a-year, which it was provided the tenant should be at

Sub-Com.
February 24,
1898.

Cooney
v.
Reps. Nixon.

liberty to retain for the purpose of keeping up the houses on the holding. The description of the premises in this second lease was the same as that in the first; and the covenants on the part of the tenant contained in it were similar in all respects to those in the first, save that the tenant (having put the premises into repair on the execution of the first lease) did not covenant in it to put the premises into repair again; but he covenanted in it to keep them in repair, and to spend annually upon keeping them up the sum of £10, which he was allowed to retain out of the rent of £90 a-year.

TEELING, Q.C., A.L.C., dismissed the application on the ground that the holding was residential.

Land Com.
March 8,
1898.

LAND COMMISSION.

(Before MEREDITH, J.)

Norton v. M'Donnell.

Demesne and mansion-house—430 acres of the holding agricultural—Application to segregate the holding under sec. 5, sub-sec. 2, Land Law (Ireland) Act, 1896.

This was an appeal by Miss M'Donnell, the middle landlord, and Lord Trimblestown, the head landlord, from the order of the Sub-Commission dated the 28th April, 1897, fixing a fair rent upon the lands of Turvey, at Donabate, in the County of Dublin, which were formerly the Trimblestown family seat. It appeared that in 1858 the then Lord Trimblestown, who was tenant for life of the lands in question, leased the mansion-house, demesne, and farm of Turvey to one M'Donnell for certain lives, one of which was still in being; and M'Donnell, in his turn, had sub-leased the

lands to the present tenant, Mr. Norton, who carries on the business of a maltster in Dublin. The entire holding consists of over some 500 acres, and the rent paid by Mr. Norton under his lease was £1,031 11s. 3d. In 1887 Mr. Norton applied to have a fair rent fixed ; but the application was then refused by reason of part of the holding being demesne land. On the present application it was conceded by the tenant that the mansion-house and seventy acres of plantation and pleasure-ground around the house were demesne lands ; but he contended that under section 5, sub-section 2, of the Land Act of 1896, he was entitled to have the mansion-house and the 70 acres separated from the remaining 500 acres, and a fair rent fixed in respect of the latter. This sub-section provides that, when a distinct and substantive part of the property held under one demise is demesne land, and the Court consider that that part is not the substantial part of such property, the Court may, if they are of opinion that, apart from the fixing of a fair rent, the separation of the holding into two parts will not diminish the landlord's interest therein, order that such part be thenceforth treated as a separate holding, and may fix a fair rent thereon. The landlords in the present case contended that the substantial part of the holding was demesne lands, and, further, that the separation of the holding into two parts under the Act of 1896 would seriously diminish their interest and lessen their security for the rent. The Sub-Commission, by their order, severed the holding, fixing £180 on the mansion-house and 70 acres, and £605 on the residue of the land.

The Court reversed the decision of the Court below, holding that upon the evidence they were satisfied, though not without some doubt, that the severing of the holding into two parts would diminish the landlord's interest in the property, and accordingly dismissed the originating notice.

Land Com.
March 8,
1898.

Norton
v.
McDonnell.

Sub-Com.
February,
1898.

SUB-COMMISSION.

(Before BAILEY, A.L.C.)

M'Mullen v. Dunleath.

Town park—Land Law (Ireland) Act, 1881—Suburbs of Downpatrick—Inaccessibility from the town except by a circuitous or steep approach.

BAILEY, A.L.C.—This is a holding of 3a. 1r. 30p., situated about three-fourths of a mile from Downpatrick. It has the characteristics of a town-park. It is near the town, and it bears an increased value as accommodation land. But for the question of the residence of the tenant, we could not hesitate in arriving at the conclusion that the application to fix a fair rent should be dismissed. Mr. M'Mullen, the tenant, succeeded to his uncle, a watchmaker, in Downpatrick, in 1873. He was then living on a farm, which he had got on his marriage, outside Downpatrick. He was also residing there in 1881, and is at the present time. The question, accordingly, arises, Was the tenant living in the town or the suburbs thereof on the 22nd of August, 1881, the crucial date, as was held in the case of *Nelson v. Headfort* by the Court of Appeal? The farm on which the tenant lives is known as the Island Farm. It consists of 72 acres, and is subject to a statutory term. It is about half-a-mile beyond the cathedral of Downpatrick. From an inspection of the Ordnance map some difficulty would arise in determining whether this holding could be held to be in the suburbs of Downpatrick. I have, accordingly, in company with my colleagues, inspected it; and we have come to the conclusion that it would be impossible to regard this residence of the tenant as being within the suburbs of the town. It is reached by a

narrow roadway, half-a-mile in length, starting from the cathedral. This roadway is exceedingly steep, difficult, and "switchback" in character. The result is that the residence of the tenant is as difficult to reach by this road as if it were three times as far away on a level road. It could not be said to be in the "residential fringe" around Downpatrick. It is an agricultural holding in the country; and the occupier is certainly not living in Downpatrick or the suburbs thereof. This being so, we must come to the conclusion that the holding on which we are asked to fix a fair rent is not a town-park within the meaning of the Land Acts; and we fix a fair rent accordingly.

Sub-Com.
February,
1898.

M. Mullen
v.
Dunleath.

Bailey, A. L. C.

LAND COMMISSION.

Land Com.
March 11,
1898.

(Before MEREDITH, J., HON. GERALD FITZGERALD and
LYNCH, Commissioners.)

M. Neill v. M. Naghten.

Town-park—Letting—User—Land Law (Ireland) Acts,
1881, 1887.

The holding comprised 8 acres 2 roods. The old rent was £23. The application by the tenant had been dismissed by the Sub-Commission.

MEREDITH, J., said that the question was raised in the Court below that the holding was a town-park. The holding consisted of one field, about three-quarters of a mile from Bushmills, containing 8 acres 2 roods, and held at a rent of £23. The Sub-Commission Court, of which Mr. Tuckey was chairman, dismissed the originating notice on the ground that the holding was a town-park. There were no buildings on the

Land Com.
March 11,
1898.

M'Neill
v.
M'Naghten.

Meredith, J.

holding, and the schedule filed by the Sub-Commissioners showed that the field was used as a tillage farm in connection with the tenant's posting establishment. It was admitted by counsel on behalf of the tenant that Bushmills was a town, and that there were town-parks in the vicinity; and on behalf of the landlord an order of the Court was made in the case of Rose Ann Hale, tenant, Sir F. Macnaghten, landlord, dismissing an application by Rose Ann Hale to have a fair rent fixed in respect of a holding held at a rent of £21, which was entered. The holding in this case lay a short distance further out than the holding of Mrs. Hale. The field was taken direct from the landlord by Mr. James M'Neill, the husband of Mrs. Margaret M'Neill, the present tenant. Mr. M'Neill had a public-house in the town of Bushmills, and rather a model posting establishment in connection with it. Mr. M'Neill, however, died in 1886, and his widow and son had carried on the business in the town. The business had considerably extended, especially the posting branch of it, and now some eight or nine horses were kept constantly employed. There was also a grocer's shop in addition. Mr. Douglas, the agent of the landlord, stated that the field had been originally part of the holding of a man named Skerry, which was taken up and divided, and this field was let to a man named M'Ilroy at a rent of £30, the tenant being an hotel-keeper in the town of Bushmills. When Mr. M'Ilroy gave it up to the present tenant, it was let at £23. They (the Chief Commissioners) were satisfied that Bushmills was a town, and that the tenant M'Neill was resident in the town at the date of the passing of the Act of 1881, and his family had been in it ever since. The holding bore an increased value as accommodation land; and the real question argued before them was whether, upon all the facts, the holding had not been let and used as an ordinary agricultural farm. Young M'Neill had

stated that the produce of the farm last year consisted of oats, hay, potatoes, and turnips. The oats were consumed by the horses used in connection with the posting establishment. The turnips were consumed by the cows or sold in the shops. A clearer case of accommodation user, perhaps, it would be difficult to find. The previous user was not so clearly and conclusively an accommodation user; but during the past few years, since the posting establishment had developed, there could be no doubt but that the holding was used as accommodation land. The Commissioners held that the holding bore an increased value as such, and for those reasons they affirmed the decision of the Sub-Commissioners, and dismissed the originating notice.

Land Com.
March 11,
1898.

McNeill
v.
McNaghten.

Meredith, J.

LAND COMMISSION.

Land Com.
June,
1897.

(Before BEWLEY, J., and Mr. FITZGERALD, Q.C.,
Commissioner.)

Bell v. Glenny.

In this case a fine of £1,300 had been paid by the tenant's predecessor at the time of obtaining a lease, renewable for ever, in 1874. Previously the rent had been £180, and was in the landlord's hands for a few months. On the payment of the fine, a rent was fixed at £100, and a fee-farm rent was made at the same sum. Application was made under the Redemption of Rent Act, and the landlord declined to allow redemption. The Sub-Commission (Bailey, A.L.C.), at the hearing in Armagh, fixed the fair rent at £70, after making a deduction of £26 in respect of the fine, the fair rent on the lands having been fixed at £96 by the Lay Commissioners. The lands are in the Union of Banbridge.

Land Com.
June,
1897.

Bell
v.
Glenny.

BEWLEY, J.—The Court was bound by its own ruling in the case of *Mollan v. Kieran*, and not by the case of *Lanyon v. Clinton*, which was decided by them on different facts. Accordingly, they refused to make an abatement on account of the payment of £1,300, which was in law a fine. As to the contention that £100 was not a “full agricultural rent” within the section, the Court held that it was such, and that a rent could not be fixed on the holding.

See *Bell v. Glenny*, *ante*, p. 315.

The Court of Appeal subsequently affirmed the decision of the Land Commission, and held that the lessee was not entitled to credit for any portion of the fine paid.

Land Com.
May 1,
1897.

LAND COMMISSION.

(Before BEWLEY, J.)

Magner v. Harris.

*Redemption of Rent (Ireland) Act, 1896—Non-residential
—Renting building which tenant was entitled under
his covenant to remove.*

BEWLEY, J.—In this case a question arose as to buildings on the holding. The application was under the Redemption of Rent Act. The lands were under lease dated 28th August, 1873, for a term of 900 years, at a rent of £150 a-year. The lease was made to Mr. W. H. Crawford, a well-known gentleman in Cork. They were of opinion that it was a residential holding, and so decided. That decision, however, had been reversed by the Court of Appeal, and the case now came before them to fix a fair rent. In the lease of the 28th August, 1873, there was a covenant that the lessee

should have power to remove and take down and alter any house or building without being held liable. As a matter of fact, he had not removed or taken down or altered the buildings, but he had allowed them to fall into great disrepair. Even in their present condition the Court valuers estimated the annual value of the buildings at £10 a-year. In fixing the fair rent the Sub-Commissioners exempted the tenant from rent in respect of these buildings. In his opinion the tenant was not entitled to such exemption. These buildings were not erected by the tenant or his predecessor in title. If he had exercised his power under the covenant, he could have swept the buildings off the face of the holding; but, as the matter stood, the buildings were on the holding; and the buildings having been erected by the landlord or her predecessor, they were of opinion that they should be taken into account in fixing the rent. The old rent was £150, the judicial rent £67 10s., and they now fixed the rent at £77 10s.

See *Magner v. Harris*, Supreme Court of Judicature, *ante*, page 78.

Land Com.
May 1,
1897.

Magner
v.
Harris.

Bewley, J.

LAND COMMISSION.

Land Com.
June,
1897.

(Before MR. JUSTICE BEWLEY.)

Boyd and others v. Trustees of M'Cay.

Land Law (Ireland) Act, 1891—Fines paid by lessees on renewal of leases.

These cases were heard at Armagh on 5th May, on appeals from decisions of the Sub-Commission at Banbridge. The question involved was as to whether any, and if so what, deduction should be made from the rents on account of fines paid by the lessees at the

Land Com.
June.
1897.

*Royd and
others
v.
Trustees of
M^r Cay.*

granting of the leases, which were afterwards converted into fee-farm grants. The Sub-Commissioners held that the sums paid by the sub-lessees were in the nature of fines, and that considerable deductions should be made from the rents as fixed by the Lay Commissioners by reason of the fines.

Mr. Justice BEWLEY held that the principle in these cases of allowing for a fine was erroneous. The sums paid were not fines, but compositions for renewals, which the lessees were, at the granting of the leases, bound to pay from time to time to their immediate landlord to procure the mutual renewals from the head landlord. That being so, it was not a payment to the landlord, but an incident of their leases without which their interest would have lapsed. Counsel for the landlord had argued that there was no case made for abatement for the sums paid, and that the tenants had obtained what they bargained for. Counsel for the tenants had submitted that as the payments were fines, as found by the Sub-Commissioners, they should be the basis of deduction. However, in no sense were the payments fines; and accordingly the Sub-Commissioners' rents should be restored irrespective of all payments to the lessor.

LAND COMMISSION.

Land Com.
July 6,
1897.

(Before BEWLEY, J., and MR. COMMISSIONER
FITZGERALD, Q.C.)

W. J. Platt v. Countess of Shaftesbury.

Redemption of Rent (Ireland) Act, 1891—Land Law (Ireland) Act, 1896—Division of the lands demised by a fee-farm grant—Cowell v. Buchanan (ante, page 217) considered.

Held, *that lands could not be subdivided.*

BEWLEY, J.—In this case an application had been made on behalf of the landlady to set aside an originating notice under the Redemption of Rent Act. The tenant, describing himself as grantee in *bonâ fide* occupation of the holding under a fee-farm grant, dated December 7, 1871, at the yearly rent of £28 8s., applied to the Court for an order for the redemption of the rent, or in the alternative for an order fixing the fair rent to be hereafter paid for the holding, described as containing 23 acres 2 roods 30 perches, and the rent was described, not as £28 8s., but as £13 13s. It appeared that many years ago, while the lands were held under a lease for lives renewable for ever, the lessee's interest was subdivided between two persons. One of the portions was now vested in the present applicant. The question was whether a person holding only portion of the lands comprised in a fee-farm grant was entitled to redeem the whole of the rent or portion of the rent which he had been in the habit of paying. The Court was perfectly clear, on the ground stated in *Buchanan v. Cowell*, that there was no provision either in the Redemption of Rent Act or the Land Act of 1896 that would enable this to be done. The tenant's originating

Land Com.
July 6,
1897.

W. J. Platt
v.
Countess of
Shaftesbury.

notice must be dismissed, with two guineas costs. In a second case between the parties, the Court was of opinion that in point of form the originating notice was unsustainable, and must be set aside, and it would be then for the tenant to consider whether he might not institute proceedings in proper form under section 5, sub-section 3, of the recent Act.

Land Com.
July 10,
1897.

LAND COMMISSION.

(Before BEWLEY, J., and MR. COMMISSIONER
FITZGERALD, Q.C.)

Kennedy v. Trustees M'Loughlin.

The facts appear in the judgment. The tenant's originating notice was dismissed by the Sub-Commission (Greer, A.L.C.).

BEWLEY, J., said the case was one of some complexity and some little difficulty. Prior to 1885 John M'Laughlin and William Simpson were tenants in common in fee-simple of 35 acres of the lands of Kil-laloe, near Limavady, County Derry. It appeared also that William Simpson was a tenant to M'Laughlin of his moiety, under a yearly tenancy, at a rent of £11 12s. 6d. In this way William Simpson had occupation of the entire 35 acres, as to one undivided moiety under an ownership-in-fee, and as to the other undivided moiety under a yearly tenancy. In 1885 William Simpson conveyed all his interest to George Kennedy, the present tenant. About that time an arrangement was come to between Simpson and Kennedy that the latter should get these lands, but should give up a portion of them as a site for an Orange Hall, and it was

out of that arrangement that all this trouble and litigation arose. By a conveyance, dated 15th December, 1886, Kennedy and Simpson purported to convey a plot of land, portion of these 35 acres, to the trustees of the Killaloe Orange Lodge. That deed operated as a valid conveyance in fee as to one undivided moiety of the site, and as to the other undivided moiety it only operated to convey the tenancy from year to year. No consent to that subdivision or assignment was obtained from M'Laughlin, who seemed to have a strong objection to the erection of this Orange Hall. M'Laughlin served a cautionary notice on 26th June, 1892, but no attention was paid to it, and the Orange Hall was erected. M'Laughlin then served a notice to quit, and an ejectment decree was granted by the Recorder of Londonderry. On appeal before Mr. Justice Johnson the decree was affirmed, but execution was suspended on certain terms. Amongst these one was that Kennedy should, on or before 16th April, 1894, duly apply to fix a judicial rent on the subject-matter of the ejectment. George Kennedy served an originating notice to fix a fair rent on one undivided moiety of the 35 acres. He also instituted proceedings for a partition of his interest between himself and M'Laughlin. The fair rent applications were adjourned from time to time, and the equity civil bill for partition was carried out under an order of Mr. Justice Murphy. This purported to allot to Kennedy the portion of the lands on which the Orange Hall was built. The case came before the Sub-Commission to fix a fair rent, and they dismissed the originating notice on the ground that the tenant was not in occupation of the holding. The Judge then detailed several other steps taken on the new originating notice, and said it was contended by the landlord that the tenant had not the necessary status to fix a fair rent. First, that he could not maintain the application to fix a fair rent in respect of an undivided

Land Com.
July 10,
1897.

Kennedy
v.
Trustees
M'Laughlin.

Bewley, J.

Land Com.
July 10,
1897.

Kennedy
v.
Trustees
of *Laughlin*.

Bewley, J.

moiety. On that point he (Mr. Justice Bewley) would be inclined to hold in favour of the tenant under subsection 2 of section 48 of the Act of 1896. The second objection was that, at the time these proceedings were commenced in 1884, the tenant was not in occupation within the meaning of the Land Acts. Now, assuming, as the Court did, that it was competent for a tenant to institute proceedings to fix a fair rent of the undivided moiety of the lands—admittedly at the time a certain portion was occupied by the Orange Hall, which was on his undivided moiety as well as the undivided moiety he held in fee, which was not in his occupation—the Court saw no answer to this objection, and did not think it could be got over. They, therefore, affirmed the decision of the Sub-Commission dismissing the originating notice.

The above decision was subsequently affirmed by the Supreme Court on appeal.

Sub-Com.
May,
1897.

SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Hamill v. Martin.

Land Law (Ireland) Act, 1881, sec. 8 (sub-secs. 3a and b).

Held, that a landlord is not entitled to an order to resume possession of a holding until a second judicial term has been actually created in respect of it.

The tenant served an originating notice to have a fair rent fixed for a second statutory term on the 27th October, 1896. The landlord, on the 22nd January, 1897, served a notice to resume possession of the holding, which he alleged he required for building purposes. The first statutory term was running, and would not have expired until the 1st November, 1896.

BAILEY, A.L.C.—It is quite clear that the landlord is here applying, during the continuance of a first statutory term in a tenancy, to resume possession of the holding for one of the purposes set forth in s. 5 of the Act of 1881. But he cannot do that during the running of a first statutory term, unless he brings himself within the two provisos in s. 8 (3), namely, if a present tenancy has arisen at the expiration of a judicial lease—which, in this case, cannot be—or of a lease existing at the time of the passing of this Act, and originally made for a term of not less than thirty-one years—which is also beyond his showing. Then the remaining proviso is that it shall be proved to our satisfaction that, before the passing of this Act, the reversion expectant on the determination of the holding was purchased by the landlord or his predecessor in title with a view of letting or otherwise disposing of the land for building purposes on the determination of such lease, and that it is *bonâ fide* required by him for such purpose. Unless that can be shown by the landlord, we have no jurisdiction to make the order sought for. We cannot, therefore, entertain the application, which is dismissed with costs.

Sub-Com.
May,
1897.

Hamill
v.
Martin.

Bailey, A.L.C.

Land Com.
January,
1898.

LAND COMMISSION.

(Before BEWLEY, J.)

Aylward v. Nolan.

Sale of tenancy to a member of the tenant's family—Notice under sec. 1, Land Law (Ireland) Act, 1881, not necessary—Land Law (Ireland) Act, 1896, sec. 19.

MEREDITH, J.—In this case, heard at Waterford, a very difficult point was raised. The entire area was 1a. 1r., and the fair rent had been fixed at 7s. 6d. The fair rent had been fixed a number of years ago ; and it was not for them now to say whether a fair rent ought to be fixed or not ; it was not appealed against. The tenant had been a herd upon the holding of James Nolan, another tenant ; he had got it under some family arrangement, and had never paid any rent until the agent required that he should pay rent in respect of the acre, and that had been fixed at 7s. 6d. This old gentleman, Aylward, became very feeble, and executed a deed in favour of his nephew Michael, who had been more or less looking after him for some time, and supporting him. He executed a deed of December 3rd, 1896 ; and it was really on the rentals contained in that deed that Mr. Boyd, on behalf of the landlord, contended that the Court were bound to set aside the deed and the sales under it. Stripped of verbiage and read in the light of the evidence, this was an old man breaking down, unable to work, who had been supported, or partly supported—kept at all events in tobacco and other necessities of life—by the nephew for five years. He had nobody else to look to ; and he agreed with the nephew that, if the nephew would allow him to continue to live in the house, and support him, he would

give this place over to him. The landlord, as soon as he heard of this deed, served an originating notice to have the sale declared void under section 1 of the Act of 1881. The County Court Judge took that view, and held that he was bound to declare the sale void, on the ground that the notices required by the section had not been given to the landlord, and that the landlord was desirous of purchasing the interest of the tenant in the holding, and having a true value fixed. On the hearing before the Court, Mr. Shortall, for the tenant, relied on the 19th section of the Act of 1896, which said that "alienation to one person only by way of mortgage or family settlement, or where marriage formed a portion of the contract or otherwise, or as for money or money's worth, shall be a sale within the meaning of section 1 of the Act of 1881 ; but the provisions of several sections thereof, other than Regulation 6, shall not apply thereto." In other words, in cases coming within the section, the tenant was not bound to serve any notice upon the landlord of his intention to sell ; but Regulation 6, which enabled the landlord to object to the purchaser upon reasonable and sufficient grounds, did not apply. Well, the landlord had not made any objection to the new tenant, but had sought to set aside the whole of the transaction on the ground that Aylward should have given him notice of his intention to sell, and notice of the name of the purchaser, and so on. The Court thought this was just one of the cases contemplated by section 19. If it were the case of a father and son, there could be no doubt whatsoever about it ; and they thought there was no distinction between that case and the case of uncle and nephew. They reversed the order of the County Court Judge (Fitzgerald, Q.C.), and dismissed the landlord's application, with costs.

Land Com.
January,
1898.

Aylward
v.
Nolan.

Meredith, J.

Land Com.
July 12,
1897.

LAND COMMISSION.

(Before BEWLEY, J., FITZGERALD, Q.C., and O'BRIEN,
Commissioners.)

Derham v. Hamilton.

BEWLEY, J.—In this case there was a question of law as to whether the tenant's right to take seaweed was such a privilege as was contemplated by section 9, subsection 1, of the Act of 1896. Under the circumstances, it was perfectly clear that, although the question of seaweed must be taken into account in this way, that the holding was one which had facilities for getting seaweed, the tenant had no privilege which he enjoyed by virtue of his tenancy. If John Smith, the tenant of some other landlord, came with his cart, and produced his shilling, he would get the seaweed just the same as Mr. Derham, and it was clear on the evidence here that Mr. Derham enjoyed this privilege, not by virtue of his tenancy, but by virtue of being a member of the public having a shilling in his pocket to pay for each load of seaweed. Under these circumstances, they could not make any order under this section; but the circumstance of the existence of seaweed to be sold at a moderate price close to the holding was a circumstance that could not be left out of account, just in the same way as proximity to a railway station, fairs, or markets, or anything of that nature. In this first case the old rent was £22, the judicial rent £15; the Court valuers had valued it at £14 10s. But Mr. Fitzgerald and he were of opinion that there were certain improvements done by the tenants in the way of removing stones that were not taken into account by the Court valuers; and they thought the rent ought to be fixed at £14.

O'BRIEN, C.—The Judicial Commissioner has decided that the privilege of getting seaweed for the use of this holding is not one to which section 9 of the Land Law Act, 1896, applies. I should have thought otherwise. In every fair rent case that I have heard from this estate, the privilege of getting seaweed on payment of one shilling a load has been represented as materially enhancing the value of the farms, and as a reason for higher rents than would otherwise have been fixed. I believe they have been fixed substantially higher than they would have been without this privilege. It was not a question merely of proximity to the seaweed, for that is of no use if the farmer can be debarred from getting it. The payment now required might be increased. Mr. Hamilton can withhold the privilege if he likes. It was withdrawn for some years from Mr. Derham, and may be again. Even now he cannot take a load of seaweed until the bailiff comes to see what is taken, and gives leave for its removal. The value of this island for farming purposes depends on the possibility of having seaweed for manure. The cost of bringing manure from the mainland would swallow up all farming profits. As it is, the difficulty of getting to and from the island for necessary work at suitable times, the danger occasionally (for one man was drowned coming from his work), the cost of removing the crops, and the absence of any farm buildings, make farming profits small and uncertain. The fair rent, with the necessary supply of seaweed, should, in my opinion, be £7, and without the privilege of seaweed £3 10s.

Land Com.
July 12,
1897.

Derham
v.
Hamilton.

O'Brien, C.

Sub-Com.
January,
1897.

SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Smart v. Jones.

This was an application to have a fair rent fixed. The tenant held under an agreement and declaration fixing a fair rent, entered into on the 26th September, 1883. The farm, which consisted of 4 acres 3 roods 22 perches, was in 1881 portion of a larger holding of 10 acres. It was in the occupation of two persons, who occupied separate and distinct portions. An originating notice was lodged and duly recorded when the Court first sat. The agent subsequently entered into an agreement with each tenant at a rent for his own part, and the originating notice was not proceeded with.

BAILEY, A.L.C.—The only question that has to be considered is, Must the holding now seeking the shelter of section 4 of the Act of 1896 be the same holding as that for which the application was made and recorded in 1881? I am of opinion that the provisions of section 4 of the Act of 1896 will be satisfied where the holding for which the agreement was entered into was part of the holding for which the application was made and recorded in 1881. In the case of *Doyle v. Truell* (unreported) the Court of Appeal appears to have decided on a case stated that a tenancy created before the 1st of January, 1883, would be a present tenancy if every portion of the lands comprised therein was the subject of a subsisting tenancy at the date of the passing of the Land Act of 1881. Under the circumstances, I am of opinion that the tenant is entitled to apply to have a second statutory term and another judicial rent fixed.

SUB-COMMISSION.

(Before BAILEY, A.L.C.)

Sub-Com.
February,
1897.**Murphy v. Richardson.**

This was an application to fix a fair rent on a holding containing 11 acres 3 roods 18 perches. The tenant did not reside on the holding, and the dwelling-house which was on it was let to his daughter, a shopkeeper, at £6 10s. per annum. The entire rent of the holding was £7 3s. 8d. The question raised by the landlord was, whether the tenant could be deemed to be in occupation notwithstanding the sub-letting of the dwelling-house.

BAILEY, A.L.C., referred to the 7th section of the Land Law (Ireland) Act, 1896, which is to the following effect :—"The tenant of a holding shall be deemed to be in *bond fide* occupation thereof, notwithstanding that any dwelling-house on the holding, not being the dwelling in which the tenant for the time being resides, is sub-let to, or in the occupation of, another person," and said the words of the exception are curious. It is not easy to understand how the tenant can sub-let the dwelling in which he resides. The verb in the sentence is in the present indicative, and in strict grammar I do not see how a tenant could be excluded under the exception, unless he were living in the house with his own sub-tenant. To give any other meaning to the section we should read the present tense as if it were the past tense, or the indicative mood as if it were the subjunctive. This strained grammatical construction I do not think we are at liberty to adopt. The house which is sub-let is not the house in which "the tenant resides." We hold that the tenant does not come within this particular exception from the benefits of the section, and that he is in *bond fide* occupation of the holding, and entitled to have a fair rent fixed.

Sub-Com.
November,
1897.

SUB-COMMISSION.

— — —
(Before BAILEY, A.L.C.)
— — —

Torley v. Gordon.

Holding in the vicinity of the town of Newry—Tenant evicted and sub-let houses upon it—Land Law (Ireland) Act, 1881, section 8—Land Law (Ireland) Act, 1896, section 7.

Held, that such sub-letting did not exclude the tenant from the provisions of the Land Law Acts, but that the landlord was entitled to a share of the net profit rent derived from the houses erected by the tenant upon the holding.

BAILEY, A.L.C.—This is an application to fix a fair rent on a holding of 19 acres, held at a rent of £29 13s. 2d. There are three cottages and a dwelling-house on the holding, which are sub-let. They were all built by the tenant or his predecessor. The sub-letting of these houses does not exclude the tenant from having a fair rent fixed (Land Law (Ireland) Act, 1896, section 7). We are, however, of opinion that the landlord is entitled to participate in the benefit which accrues from the position of the holding, and the facility which that position gives for letting the houses to persons who find it necessary or convenient to reside near Newry. The houses were all erected by the tenant. He is accordingly entitled to have them exempted from rent. Furthermore, he is entitled to get a full and ample return for the cost of erection and maintenance of the buildings. Until these charges are allowed for, there is no residue which can be allocated or distributed. If, however, we find that, after allowing for such charges,

the actual average income obtained from the letting of houses leaves a substantial residue or margin which is due to the situation of the lands close to a town like Newry, where there is a ready and constant demand for suburban residences, we think that the landlord who owns the land is entitled to participate in the distribution of such residue with the tenant whose industry has created the improvement which enables the profit to be made. The Act of 1881 (section 8) requires us to take into account all the circumstances of the case, holding, and district. Our fair rent on the land, arrived at after considering the valuation of the land, its advantages and disadvantages from an agricultural point of view, including its situation as regards Newry, is £13 5s. To this we add the sum of £4 as the share of the net profit obtained from the letting of the houses. This sum we arrive at after a consideration of the cost of erection and maintenance of the buildings. We accordingly fix the fair rent at £17 5s.

Sub-Com.
November,
1897.

Torley
v.
Gordon.

Bailey, A.I.,C.

Appeal.
February 17,
1897.

SUPREME COURT OF JUDICATURE.

COURT OF APPEAL.

(Before LORD ASHBOURNE, C., and FITZGIBBON and
WALKER, L.JJ.)

**M'Ginley v. Education Board of Cavan
Presbytery.**

Temporary Convenience—Land Law (Ireland) Act, 1881.

The holding contained 45 acres, and was held under a deed of fee-farm grant of 1748 in trust for the benefit of the Protestant Dissenters of Croghan, near Killeshandra, in the County of Cavan. It was included in a scheme settled by the Education Endowments Commission in 1894. In 1879 the Rev. Mr. Strong, their clergyman, let the land in question to Mr. Thomas M'Ginley. The trustee of the property, Mr. Ferris, it was stated, knew nothing of the letting until subsequently after Mr. Strong resigned. Mr. Ferris then wrote to the tenant stating that Mr. Strong had no power to make the letting, and requesting him to pay the rent in future to him as trustee for the congregation. In 1881 the present clergyman, the Rev. Mr. Whitsitt, came to the church, and the tenant from that date paid the rent to him and to Mr. Ferris. M'Ginley lived about ten miles away from the place, and held the lands chiefly for grazing purposes. The Land Commission dismissed the tenant's application to have a fair rent fixed, on the ground that the holding had been let for temporary convenience. The Lord Chancellor gave judgment affirming the decision of the Land Commission, and dismissed the tenant's appeal with costs.

LAND COMMISSION.

Land Com.
March,
1898.

(Before MEREDITH, J., the HON. GERALD FITZGERALD
and LYNCH, Commissioners.)

Teggart v. Balrd ; Coulter v. Same.

*Land Law (Ireland) Act, 1896, sec. 18—Present and
Future Tenancy—Evidence of.*

In these cases the tenants occupied holdings prior to the passing of the Land Act of 1881, and in 1886 they acquired portions of mountain pasture which they fenced into their original holdings. They applied to the Court to fix rents on the entire holdings under the provisions of the 18th section of the Land Law (Ireland) Act, 1896. The Sub-Commission dismissed the applications on the ground that the tenants had failed to satisfy the Court that the landlord had consented that the tenancies in the holdings should be present tenancies.

MEREDITH, J.—During the argument the Court intimated that they considered the view taken by the Sub-Commission, that there was not evidence sufficient to satisfy the Court that the landlady had consented that the tenancy in the additional portion of the land should be deemed a present tenancy, and they now upheld the decision of the Sub-Commission as to the area, but fixed the rent at £6 15s. In the case of John Coulter, tenant, same landlady, in which a similar question arose, the rent fixed by the Sub-Commission was £8, and that they confirmed.

Land Com.
1898.

LAND COMMISSION.

(Before MEREDITH, J., F. WRENCH and HON. G.
FITZGERALD, Q.C., Commissioners.)

Feeny v. O'Sullivan.

*Tolls of a fair included in a lease of agricultural lands—
Segregation of same—Land Law (Ireland) Act,
1896, sec. 5, sub-sec. 2.*

MEREDITH, J., said the holding, the subject of the originating notice, was held by the tenant under a lease of August 7th, 1871. In addition to the land, which comprised 181a. 2r. 22p., the lease demised the tolls and customs of the Tubberbracken Fair; and the contention of the tenant in the Court below, which was successful, was that his case came within section 5, sub-section 2, of the Act of 1896. The appeal was taken by the landlord upon the ground that the rent fixed by the Sub-Commission upon the agricultural portion of the holding ought to be increased, and that the value placed upon the tolls and customs of Tubberbracken Fair was too small, and should also be increased. It was a little difficult to ascertain what was "the proper proportion of the rent reserved by the demise" in respect of the tolls and customs. In the opinion of the Court on the question of the construction of the statute, these words meant the proper proportion of the rent reserved by the lease payable by the tenant under the lease in respect of the tolls and customs. The Court had no power or jurisdiction to fix a fair rent in respect of the tolls or customs, and all the Court had to do was to ascertain and determine, as best they could, what was the proper proportion of the rent reserved by the lease itself in respect of this. On the best consideration that they

had been able to give to the case, they had come to the conclusion that the proper proportion was the sum of £20 a-year ; and, during the continuance of the lease—which had three years still to run—the tenant would be obliged to pay, in respect of the non-agricultural portion of the incorporeal hereditament, the sum of £20 a-year to the landlord. The Court had jurisdiction to fix a fair rent in respect of the agricultural portion of the holding ; and in respect of that, they were of opinion that the fair rent was £63. The former rent of the entire holding was £100 ; the rent fixed by the Sub-Commission was £72 ; and they now fixed the rent upon the agricultural portion at £63, leaving the tenant to pay £20 for the remaining portion of the demise.

Land Com.
1898.
Feeny
v.
O'Sullivan.

Meredith, J.

SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

Case stated.
December,
1896.

(Before ASHBOURNE, C., FITZGIBBON, BARRY, and
WALKER, L.JJ.)

Johnson v. Courtney.

This case raised the same question as that which will be found in Curneen v. Tottenham, ante, p. 509, namely, that where no improvements were made by the tenant the Court, in fixing the true value, were not restricted to the sums payable for disturbance under the Landlord and Tenant (Ireland) Act, 1870.

At the request of the landlord the Land Commission stated a case for the opinion of the Court of Appeal. The holding, which had no buildings on it, contained 3a. 2r. 22p., held at the yearly rent of £4 8s. 2d. The tenant served notice of his intention to sell, and the

Case stated.
December,
1896.

Johnson
v.
Courtney.

landlord required the true value of the holding to be fixed. The Sub-Commission determined the true value at £68. The Land Commission reduced the amount to £60; and the Court of Appeal was asked to decide whether or not, in fixing the true value in a case where there are no improvements made by the tenant, the Court can fix a larger sum than would be given to the tenant if he was *disturbed* in the occupation of his holding by the landlord.

Ashbourne, C.

ASHBOURNE, C., referred to the cases of *Eager v. Sealy* and *Curneen v. Tottenham*; and said the Court was of opinion that the arbitrary scale of compensation fixed by statute (Landlord and Tenant (Ireland) Act, 1870) was not necessarily the measure of the true value of the tenancy where no improvements were proved to have been made by the tenant or his predecessor in title; and they were of opinion that the true value of the tenancy was £60. The Court was unanimously of opinion that the question put should be answered in the affirmative.

Land Com.
Feb. 2,
1898.

LAND COMMISSION.

(Before MEREDITH, J., and the HON. GERALD FITZGERALD, Q.C., Commissioner.)

Clark v. Taylor.

*Land Law (Ireland) Act, 1881, section 1, sub-sec. 3—
True value—Disagreement as to price—Meaning of
words "without prejudice" contained in offer—
Walker v. Wiltshire referred to.*

MEREDITH, J.—In this case an application was made on behalf of the tenants for an order that two originating notices to ascertain the true value of the tenancy with a view to purchase, which notices were dated respectively

December 17th and 28th, be dismissed with costs. The facts were stated in the affidavit of Mr. John Clark, who was one of the tenants, and who was solicitor for himself and his co-trustees, the tenants being the executors and trustees of the will of the late Jane E. Fullam. On December 15th, 1897, Mr. Clark and his co-trustee prepared and, on December 16th, served upon the landlord a notice according to the prescribed form of intention to sell their tenancy. On December 17th, and before any communication had been made from the landlord to the tenants, an originating notice in Form No. 2, seeking to have the true value of the tenancy ascertained, was served by Mr. Thomas Ormsby as solicitor for the landlord, Captain Taylor, upon Mr. Clark. On December 22nd Mr. Henry Stewart Johnson, land agent to the landlord, wrote to Mr. Clark :—" I am anxious to settle about Trubly lands (late Miss Fullam) ; and to save expense I offer, on Captain Taylor's behalf, the sum of £1,200, which I hope you will consider fair, and treat without prejudice." On December 28th the landlord served a second originating notice to ascertain the true value, in identical terms with the first. Mr. Clark, in his affidavit, stated that no offer for purchase had been made to him, or to his co-executor and trustee, of any description, save the letter of December 22nd, " which I was unable to use, and did not reply to or communicate to my co-tenant ; nor had any disagreement arisen as to the terms of the purchase which entitled the landlord to elect to purchase under clause 1 of the Act, or to apply to the Court to ascertain the value of the holding." He further said that, before the time limited for making an offer had expired, and after the receipt of the notice of December 28th, he informed Colonel Johnson and his solicitor that he could not accept as valid for the purpose of the Land Acts a letter written without prejudice, and would oppose their relying on the same as an offer so as to constitute

Land Com.
February 21,
1898.

Clark
v.
Taylor.

Meredith, J.

Land Com.
February 21,
1898.

Clark
v.
Taylor.

Meredith, J.

the existence of a disagreement. Mr. Johnson, in his affidavit, said the offer of £1,200 was made by him *bond fide*. He believed the same was a fair price for the purchase of the holding ; but he made the offer without prejudice, as the Court might fix the true value at a lesser sum. Mr. Healy, for the tenant, contended that no *bond fide* disagreement between landlord and tenant as to the price of the holding, as a condition precedent to the service of an originating notice to fix the true value of the tenancy, existed in this case. His Lordship read the section of the Act and the rules of the Land Commission (Nos. 99 and 100), and said the question of disagreement, within the meaning of the Acts and rules, was a question of fact depending upon the circumstances of each particular case. With regard to the first of the notices, it was perfectly plain that there was no attempt at an agreement of any kind at all, and that the originating notice was premature, and must be dismissed. With regard to the second, the strength of the argument of Mr. Healy lay in the use of these words, "without prejudice." In *Walker v. Wiltshire* Lord Justice Lindley discussed the meaning of "without prejudice." Applying these observations to the present case, the Court were of opinion that the landlord, by the letter of December 22nd, made an offer to the tenant before the service of the notice of December 28th to purchase the tenancy at a price of £1,200 ; that it was open to the tenant to accept that offer, and to compel the landlord to pay that price. That offer was not accepted ; and that constituted a disagreement within the meaning of the Act. They were, therefore, unable to set aside the second originating notice, and made no rule on the application, giving no costs in either.

LAND COMMISSION.

Land Com.
March 8,
1898.

(Before MEREDITH, J.)

Mullan v. Traill.

*Land Law (Ireland) Act, 1881, sec. 1—Sale of holding—
Disagreement as to price, &c.*

The landlord, Dr. Traill, applied that David Innis, of Coleraine, should be compelled to execute to him a conveyance of the farm of Castlecolt, on his (Dr. Traill's) estate, on payment by him of the sum which the Land Commissioners had fixed as the true value. Innis had served notice for leave to appeal from the amount fixed as the fair rent. John Mullan, the tenant of the farm, had mortgaged it to Mr. Innis for £100, and having sold his interest, and obtained an ejectment decree, had gone into possession. It was also sought by Innis to set aside the proceedings between Mullan and Dr. Traill, out of which the fixing of the true value had arisen, as collusive.

Judge Meredith delivered judgment against Dr. Traill's contention, on the ground that there was no "disagreement as to price" between Mullan and Dr. Traill, on which the proceedings to fix the true value rested; and also on the ground that Mullan, when he served the notice to sell, was not the tenant of the holding.

NOTE.—This Report may be read in connection with a judgment delivered in a case between the same parties by Mr. Justice Bewley, at page 96, under "Ulster Custom," &c.

Land Com.
1884.

LAND COMMISSION.

(Before O'HAGAN, J., LITTON, Q.C., and VERNON,
Commissioners.)

Smith v. Downshire.

*Land Law (Ireland) Act, 1881—Tenants' improvements
—Buildings—Expiration of lease—Ulster Custom—
Presumption.*

The facts are fully given in the judgment.

O'HAGAN, J.—The question arises whether, on fixing a fair rent for a holding, some rent should be placed upon certain buildings. The present holding was a consolidation of what was formerly two holdings comprised in two leases in the year 1809. The holdings came into the possession of a Protestant clergyman, the Rev. Mr. Blakely, as tenant. In both those leases there were covenants binding the tenants, when required thereto within three years after the date of the lease, to erect certain buildings, dwelling-houses, barn, and stables. Now, the leases remained in existence until the year 1874. The present tenant succeeded the Rev. Mr. Blakely about ten years previously—that is to say, 1864. On the present holding there are a dwelling-house, a stable, and a barn. From the description of the dwelling-house it was a thatched, mud-walled house; they were of opinion that it was the house that was in existence and was demised by the lease, and referred to in the lease as an existing tenement. It was otherwise with respect to the out-offices. Those out-offices were plainly erected during the continuance of the lease. Now, in those circumstances, the landlord contended that at the termination of the lease those buildings became entirely the landlord's property; and that he

was now entitled to have a rent fixed upon them ; and, under the general law outside the Ulster custom, we apprehend there would be no answer to that contention, because the fourth section of the Act of 1870, as read together with the Act of 1880, expressly excluded from compensation any improvement which was effected by a tenant in pursuance of a contract for valuable consideration to erect them. But the very section of the Act of 1870 excluded from its operations the persons who claimed under the first section, which was the section validating and making legal the Ulster tenant-right.

The entire question, therefore, was as to the Ulster tenant-right. Now, the Ulster tenant-right must, of course, be proved to exist. Major M'Clintock, agent of Lord Downshire, was unable from his state of health to attend, and in those circumstances it was consented that the evidence given by Major M'Clintock, not in the present case, but in another case, presenting precisely similar features, before the Sub-Commission, should be accepted and read in evidence as if it were given in the present case, and applied to the present case. They, therefore, had the evidence of Major M'Clintock so entered by consent, and from it it appeared to be perfectly clear as to what the usage was on Lord Downshire's property. He said he had known the estate for a number of years, and was thoroughly acquainted with what the usage was, and he said that upon the termination of a lease it was the ordinary course to send out a surveyor to value the holding for the purpose of fixing a fair rent upon it, but that the surveyor's instructions were to exempt from rent any improvements effected by the tenant. He was then asked specifically with respect to those buildings, and he gave his evidence that clearly, when the buildings were erected by the tenant, they were not subject to rent. His attention was then called to the case in which the tenant had covenanted to erect the buildings, and where the

Land Com.
1884.

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O'Hagan, J.

buildings were erected by him in pursuance of that covenant, and he gave his evidence to the effect that it made no difference—that whether the buildings were or were not erected by the tenant in pursuance of a covenant in the lease, if, in point of fact, they were erected by means of the tenant's money and labour, they were exempted from rent. Therefore, in point of fact, that that usage existed upon the estate was, he apprehended, clear from the evidence that was given by Major M'Clintock. But Mr. Orr contended that, even if tenant-right did exist here at the termination of a lease, it could not operate in such a case; that the law was that the buildings or other improvements which were effected by the tenant in pursuance of a covenant were done, as it were, by him for valuable consideration; that he was paid for them by getting the lease; and that they were, therefore, in law as much the landlord's property as if the landlord had, by his own outlay, or by labour paid for by him, erected those buildings, and that any usage to the contrary must be considered of non-effect. Now, that in the eye of the law dealing with contracts, and dealing with sufficient consideration, the two cases may be, the Commissioners did not contest; but in the eye of that sense of justice and fairness which underlies the Ulster custom, there was, he apprehended, the greatest possible difference, and to the persons who administer and the persons who benefit by the Ulster custom there would seem the broadest distinction in the world between cases in which the landlord had put his hand into his own pocket and erected the buildings, in which case they never were claimed for by the tenant; and the case in which it was the tenant's money, the tenant's labour, the tenant's exertions produced them, even though the landlord required him to do so by contract. There was the greatest distinction between those two cases. Under the Act of 1870 a fair rent was indirectly fixed, because

the Chairman, when he was awarding compensation to a tenant upon leaving his holding, had to consider what would be a fair rent before he could ascertain what would be the value of the Ulster tenant-right going to the tenant; and in estimating that fair rent he had to consider whether the improvements were the tenant's improvements or the landlord's improvements. He apprehended in that case, if it were proved to him to be the custom existing at the termination of a lease that the rent was not put upon the tenant's improvements—even though what was done had been done in pursuance of contract—he would not, in estimating the fair rent, have considered that any rent was to be put upon those improvements. The Act of 1881 did directly what the Act of 1870 did indirectly, and gave the power to fix a fair rent. In their opinion there was nothing in the usage shown to have existed by Major M'Clintock that was illegal. There was a conflict between the usage and the ordinary law outside of Ulster—the 4th section of the statute of 1870—but the usage having been proved, in their opinion there was no reason why it should not in Ulster be carried out. With respect to the existence of the usage, that they held to be proved. *That being so, they considered that upon the house which existed at the time of the lease (1809), and which was, in their opinion, the landlord's, some rent should be placed.* Upon the other buildings, following the custom, they did not think any rent should be placed. And, upon the whole, having regard to the evidence, they were of opinion that the judicial rent of £74 should remain, on the basis of the tenant paying, as he has been allowed to do, only half the county cess.

Land Com.
1884.

Smith
v.
Downshire.

O'Hagan, J.

Appeal.
1884.SUPREME COURT OF JUDICATURE.
COURT OF APPEAL.

(Before SULLIVAN, C., PORTER, M.R., FITZGIBBON
and BARRY, L.JJ.)

Sir Victor Brooke's Estate.*Land Law (Ireland) Act, 1881, sec. 8, sub-sec. 5—Specified
value of tenancy—Ulster Custom.*

The question involved was whether the Ulster tenant-right custom existed on the estate. The tenants had served originating notices to have fair rents fixed; and the landlord required, under the 5th sub-section of section 8 of the Land Act of 1881, to have the specified value of the tenant's interest fixed by the Court. The Sub-Commission held that the holdings, being subject to the Ulster tenant-right custom or to a usage corresponding thereto, were expressly excluded from the operation of the 5th sub-section. This decision was afterwards reversed by the majority of the Land Commissioners, Mr. Litton, Q.C., dissenting. The tenants appealed.

SULLIVAN, C.—The Court are unanimous that the order of the Land Commission, which was substantially based on the judgment of Mr. Justice O'Hagan, and acquiesced in by Mr. Commissioner Vernon, could not be maintained; and that the order of the Commissioners was substantially right. Mr. Litton differed, and decisively, from the judgment of Mr. Justice O'Hagan; and the opinion of the Court now was that the judgment of Mr. Litton, and the reasons on which it was founded, were right. His Lordship stated the circumstances under which the cases came before the Court, and said that Sir Victor Brooke had endeavoured to have a value of the tenancy ascertained, and he was met by the

tenants, who contended that their holdings were subject to the Ulster tenant-right custom ; and if their contention was right, there was no authority, as claimed by the landlord, to fix the specific value under the section. The question, therefore, for the Court was whether their holdings were subject to the tenant-right custom or not. Now, as to the Ulster tenant-right custom—of which by this time, it might be allowed, they should have a perfectly accurate history—it had always been considered that there was nothing inconsistent with the existence of the custom in the fact that the right of sale was subject to certain modifications not entirely inconsistent with the free right of parting with the tenancy over to an incoming tenant. The tenant in existence had the right to sell it to an incoming tenant, who was to take possession of the holding under the terms of the old tenancy, and who had to pay for it. It had been asserted at first that it was inconsistent with the custom that the purchase could be limited in any way. He believed it had never been seriously suggested that the landlord's approval of the incoming tenant was inconsistent with the free right of sale ; nor had it been contended as interfering with the right that the landlord should from time to time raise the rent to a proper figure, notwithstanding the perpetuation of the tenancy and the holding being passed on from man to man. The question was whether, on the evidence before the Court in the present case, they could arrive at a custom which had all the elements of a tenant's custom, allowing the purchase-money to be assessed in the manner stated. There was no reason why the sum to be paid should not be fixed by arbitration, or at a fixed and named figure ; and the question for them to determine was whether what had taken place in this case was really the recognition of a custom essentially corresponding with the Ulster tenant-right custom—the tenant selling to the incoming tenant, who entered on possession

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of the holding, including the buildings and improvements, as part and parcel of the tenancy. If the incoming tenant gets in and pays for the privilege, the price being ascertained in any particular way, he enjoys, of course, the old tenancy, and all the elements of the latter continued in force. He had still the privilege of sale, subject, it might be, to the approval as to his successor by the landlord; and the only question was whether, in the view he (the Lord Chancellor) took of the circumstances under which the tenants in the case, in paying for the holding to the outgoing tenant a certain sum fixed—fixed under certain conditions—in respect of improvements, constituted evidence bringing the estate within the terms contended for by the tenants. Mr. Wrench, the agent, had given evidence at the Bessborough Commission; and he then stated most distinctly that tenant-right in some form existed on the estate of Sir Victor Brooke, and there was no way of getting out of that. Of course it was a matter of opinion, but it was very important in reference to the tenant-right that had been proved to exist on adjoining estates. Of course it varies very much on different estates, even within twenty miles of each other. Mr. Thompson Rea's evidence in the case was very important, as showing that "improvements" formed the pivot on which the purchase-money hung. It had been proved that the invariable course on the Brooke estate was that a tenant was allowed to part with his tenancy to another man; and that other man, if the landlord approved of him, was to pay the outgoing tenant the value of the improvements; and having paid him, he was to go into possession and enjoy these improvements. Now, in no material way could the tenant enjoy these improvements except by becoming tenant of the holding. He surely did not buy the improvements to stand on the road and look at them. It was clear how the matter stood on the Colebrook estate in the event of a change of tenancy: arbi-

tration took place on the improvements "in accordance with the rule and custom of the estate," and the value of the improvements being thus ascertained by arbitration in the manner prescribed. Sir Victor Brooke himself, in his evidence, stated that the rule was, when a tenant wished to "part with" his holding, he came to him (Sir Victor), notified the fact, and the incoming tenant was selected, subject to his approval. The words "part with" was another phrase for "to sell." Sir Victor proceeded to explain that two arbitrators were appointed, and he chose an umpire ; and the duty of the three was to decide what compensation was to be given to the outgoing tenant for any improvements he had made. The Court now held that the custom sworn to in the Court below was a good Ulster tenant-right custom, and was included in the usages referred to in the 1st section of the Act of 1870, and subsequently brought into the sub-section of section 8 of the Act of 1881 ; and it gave the tenant this right, that the landlord could not compel the Land Commission to fix a specific value to this holding.

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PORTER, M.R., concurred in the decision of the Lord Chancellor. He was clearly of opinion the various usages proved that the estate was subject to the tenant-right custom.

FITZGIBBON, L.J., expressed a similar opinion.

BARRY, L.J., in concurring, said he did not think it necessary to go over the grounds of the appeal as already stated by the other members of the Court. He was of opinion that it was proved that the holding was subject to a usage which was properly described as one of the usages prevalent in the province of Ulster, and known as the Ulster tenant-right, as described in the Act of 1870.

The Court made an order affirming the Sub-Commissioners' decision, but refused to allow costs in more than the one case.

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1897.

LAND COMMISSION.

(Before BEWLEY, J.)

Mullan v. Traill.

Land Law (Ireland) Act, 1881, section 1—Ulster custom, restricted character of—Mortgagee exercising power of sale.

BEWLEY, J.—This is an application made on behalf of the landlord, under the 1st section of the Land Act of 1881, to have the sale of the holding to John M'Fadden declared to be void. Prior to January, 1894, John Mullan was tenant to Dr. Traill of a small holding, containing about 8 statute acres in the neighbourhood of Bushmills, at a judicial rent of £4 10s. a-year; and on the 20th January, 1894, he assigned by mortgage his holding to Mr. David Innes, to secure the sum of £100 and interest at 10 per cent. That assignment contained express power to sell in the event of non-payment of principal and interest. The interest fell into arrear, and Mr. Innes accordingly proceeded to exercise the power of sale given to him by the mortgage deed. Accordingly, in November, 1896, he advertised the sale of the holding for the 12th of that month, whereupon Dr. Traill served a cautionary notice upon the solicitor who had carriage of the sale, and he further caused a poster or placard to be printed and circulated, stating that the proposed sale of the farm was illegal, and that if the sale took place steps would be taken to have it set aside. Mr. M'Laughlin, solicitor for Mr. Innes, wrote, in reply to that, that the sale would be proceeded with, and he also caused a poster or placard to be printed, in the nature of a counterblast, stating that the sale would be proceeded with, and that the person who

purchased it would be secured. The farm was accordingly sold on the 24th November to John M'Fadden for £86. Dr. Traill took the present proceedings to have the sale declared void, on the ground that no notice of the tenant's intention to sell had been given. On behalf of the mortgagee, it was alleged that the sale was under the Ulster tenant-right custom, and that the sale was made in accordance with the custom. On the other hand, on behalf of the landlord, it was contended that the Ulster custom did not prevail in any shape or form upon the estate, and, further, that if the custom did prevail, it was of a restricted nature, and that sales by auction were absolutely forbidden. On careful review of the facts, the Court had come to the conclusion that the estate was subject to the Ulster custom; but they were clearly of opinion that the custom was of the restricted nature contended for by Dr. Traill, and that the evidence given showed that sales by auction were never recognised or allowed on the estate. The next question to be considered was: Could the sale be said to be a sale in pursuance of any Ulster tenant-right custom? The mortgagee in this case was not in possession at the time he exercised his power of sale, and it had been very forcibly contended by Mr. Hume that sales under the Ulster tenant-right custom were sales by the occupying tenant to some one who succeeds him. It did not appear to be necessary for the Court to express any opinion upon that important question. It was enough to say that in this case the mortgagee had a legal power to sell under the 1st section of the Act of 1881, provided that he complied with the provisions of that Act; but in the view the Court took of it he had no power to sell by auction. Under these circumstances they thought the sale could not be treated as a sale under the custom, but a sale under the Act, and, although a sale under the Act, the person who exercised the power to sell did not comply with the requirements.

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Land Com. 1897. The serving of a notice of intention to sell was no mere formality ; for if notice had been given to Dr. Traill, he would have done as he had done in other cases—*Mullan v. Traill.* exercised his right of pre-emption. The Court were of opinion that the sale could not stand, and the order must be made that it be declared void. The sale would, therefore, be set aside, with five guineas costs.

Land Com.
February 18,
1898.

LAND COMMISSION.

(Before MEREDITH, J., and the HON. GERALD FITZGERALD, Q.C.)

Harberton v. Crawford and Kirkwood.

Land Law (Ireland) Act, 1881, section 1—Ulster custom limited—Redemption of Rent Act, 1891—Sales declared void.

FITZGERALD, Commissioner.—The tenants sold their holdings to Mr. O'Connell, an extensive house and land agent in Belfast. The landlord applied to have the sales declared void on the ground that the tenants had not given notice to the landlord of the intended sale, and that it was a breach of tenancy, and that the Ulster custom did not apply. The Court held that a limited custom existed on the estate, expressing, however, no opinion as to how far it was limited, and that the landlord was entitled to veto a purchase and buy herself if she wished. The sales to Mr. O'Connell should have been under the Act of 1881, under which notice should be served. The sales by the tenant should, therefore, be declared void.

Leave to appeal was given.

SUPREME COURT OF JUDICATURE.

Appeal.

COURT OF APPEAL.

Mansfield v. Congreve.

In this case, reported *ante*, p. 106, the Court reversed the decision of the Land Commission, and held, with Mr. Commissioner O'Brien, that there was evidence of the lands having been undemesned—FitzGibbon, L.J., stating that the onus of proving them to be demesne lands *prima facie* rested on the landlord. He said there was preponderating evidence that the character of demesne land had ceased; at least there was no evidence that the land was taken as demesne in 1847, or had ever been demesne since. Order of Sub-Commission affirmed.

LAND COMMISSION.

Land Com.
March 23,
1898.

(Before MEREDITH, J., the HON. GERALD FITZGERALD,
and O'BRIEN, Commissioners.)

Curtin v. Cantillon.

Unreasonable conduct—Deterioration of holding—Land Law (Ireland) Act, 1881, sec. 9—Wilful and culpable neglect—Careless, unsuitable farming—Value of holding in its normal condition.

MEREDITH, J.—In this case Mr. Cherry, for the landlord, asks us to postpone the hearing of the tenant's application to fix a fair rent for a period of four or five years, upon the ground that the tenant has been guilty of "unreasonable conduct" within the meaning of the

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9th section of the Act of 1881. The misconduct alleged is neglect and bad treatment of the farm, resulting in deterioration. I may repeat here what I have already said more than once, that there is almost no question connected with the fixing of a fair rent which this Court approaches—indeed, has always approached—with more anxious endeavour to elicit the truth and to avoid injustice than this question of deterioration. To value land which has become deteriorated by reason of the neglect or bad treatment of the occupier at a lower rate than it would be assessed at if in its normal and proper condition, would result in an unfair reduction of the landlord's rent, and would set a premium on the idleness, incapacity, or bad husbandry of a thriftless tenant, would indirectly work an injustice to the great body of capable and industrious farmers who cultivate their land in a proper and husbandlike manner. There is, however, a wide gulf between wilful and culpable neglect and bad treatment, and careless, bad, or unsuitable farming. Mr. Justice O'Hagan long ago pointed out that distinction; and for more than fifteen years, at all events, the distinction had been borne in mind. In a proper case, for example, if it were proved that the tenant had deliberately neglected or ill-treated his farm with a view of obtaining a lower rent, we should not hesitate to exercise the power, which unquestionably we possess under the 9th section, of either refusing to accede to the tenant's application to vary the rent, or adjourning the case for a sufficient time to enable the land to be brought into proper condition. But in the view we take of the evidence in the present case it would be wrong to exercise this power; we are satisfied that this is a case of want of care and of bad farming, not a case of misconduct. The land is naturally subject to furze, and the tenant has not displayed any energy in coping with the evil. The land in part bears traces of temporary deterioration, resulting from over-meadowing

and want of attention to drains ; and still the evidence leads us to think that the farm is not in a worse condition than that in which it was on the 24th March, 1882, when the Court first fixed a fair rent ; and it is a circumstance of some importance that no application was made to the Sub-Commissioners to dismiss or postpone the tenant's application in respect of the second statutory term on the ground of deterioration. The landlord's notice of rehearing specifies one ground of appeal, and one only, namely, that the acreable rent assessed on the whole farm is too low. I confess that I think it would have been fairer to the tenant if the important question argued before us had been brought before the Sub-Commission, or at least indicated in the landlord's notice of rehearing as one of the grounds of appeal. However, dealing with the case as it comes before us, and having regard to the report of our Court valuers, which satisfies us that the Court is in a position to ascertain and estimate the value of the holding, not merely in its present condition, but in the condition in which it ought to be if it had been fairly and properly treated—taking the entire circumstances into consideration, we are of opinion that the justice of the case will be met by estimating the rent upon the value of the land as if it were in its normal and proper condition ; and upon that basis we fix the fair rent at the sum of £35.

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January,
1897.

LAND COMMISSION.

(Before BEWLEY, J., and COMMISSIONER
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Power v. Prendergast and another.

Fair rent application—Holding within the altered municipal boundary of a town does not deprive the tenant of the right to have a fair rent fixed—Second statutory term.

The facts appear in the judgment.

BEWLEY, J.—The holding, which is part of the town-land called Gibbet Hill, contains 9 acres 2 roods 25 perches, statute measure, and lies about a quarter of a mile outside the old municipal boundary of Waterford.

It consists of a couple of grass fields, about 150 feet or 180 feet above the sea-level, very precipitous on the side next the road skirting the Suir. There are a dwelling-house and offices on it, valued at £5 10s., and the fields are used as ordinary pasture. Though the holding, by virtue of an Act of the last session, has been made part of the City of Waterford *de jure*, no one would, I think, describe it as part of the city *de facto*. The street lamps, which were looked on in *Perry v. Farley* as such strong evidence of a non-agricultural locality, do not appear to have yet advanced to this quarter.

The physical character and user of the holding do not appear to have changed in any material way since the judicial rent was fixed in 1882; and unless the

transfer by statute of the invisible municipal boundary line from a quarter of a mile to the east to some distance to the west has had the legal effect of depriving the holding of its agricultural or pastoral character, I do not see how the objection to the fixing of a judicial rent can be sustained.—Order of County Court Judge fixing fair rent for second judicial term affirmed, and rent made £18.

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